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No. 04____

In the Supreme Court of the United States

JOHN WASHINGTON HIGHTOWER,
Petitioner,

v.

DERRICK SCHOFIELD, WARDEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit improperly affirmed the Georgia courts' failure to conduct a complete three-prong analysis as required by *Batson v. Kentucky*, 476 U.S. 79 (1986) in evaluating Petitioner's claim that the prosecution purposefully excluded African-Americans from petitioner's capital jury in violation of the Sixth and Fourteenth Amendments.

2. Whether in contrast to the constitutionally required *ex parte* hearings, the prosecutor's attendance and active participation at pre-trial hearings to consider an indigent capital defendant's requests for funds for psychiatric expert services under *Ake v. Oklahoma*, 470 U.S. 68 (1985), violates the Fifth, Sixth, or Fourteenth Amendments.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties appear in the caption of the case on the cover page.

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JOHN WASHINGTON HIGHTOWER,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Washington Hightower respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 365 F.3d 1008. (App. A, A1-A68). The relevant opinion of the United States District Court for the Middle District of Georgia (Athens Division) is unreported. (App. B, A69-A120). The Order of the Supreme Court of the United States extending the time for filing a petition for a writ of certiorari in the above-entitled case to November 1, 2004 is attached. (App. D, A122).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 12, 2004, and the petition for rehearing, en banc, was denied on June 4, 2004. On August 23, 2004, Justice Kennedy extended the time for filing a writ of certiorari to November 1, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 5th Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, 6th Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, 14th Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 2254(d) and (e)(1) of Title 28, United States Code

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254 (2000).

STATEMENT OF THE CASE

This case presents important constitutional issues relating to invidious discrimination where the courts below are fragmented: 1) Whether the Eleventh Circuit improperly affirmed the Georgia courts' failure to conduct a complete three-prong analysis as required by *Batson v. Kentucky*, 476 U.S. 79 (1986) in evaluating Petitioner's claim that the prosecution purposefully excluded African-Americans from petitioner's capital jury in violation of the Sixth and Fourteenth Amendments; and 2) whether in contrast to the constitutionally required *ex parte* hearings, the prosecutor's attendance and active participation at pre-trial hearings to consider an indigent capital defendant's requests for funds for psychiatric expert services under *Ake v. Oklahoma*, 470 U.S. 68 (1985), violates the Fifth, Sixth, or Fourteenth Amendments to the Constitution.

The Eleventh Circuit improperly affirmed the Georgia courts' failure to conduct any analysis as required by *Batson's* third prong. As recognized in the concurring opinion, the approach taken by the trial court and affirmed by the Eleventh Circuit suggests that once a prosecutor has articulated reasons for his challenges, a court's finding that those reasons are race-neutral is sufficient to end the *Batson* inquiry. This approach is an unreasonable application of clearly established federal law as determined by this Court and should be rejected.

The courts of fourteen states have addressed the issue of whether *ex parte* hearings for determining the need for access to expert psychiatric assistance are substantive rights under *Ake*.[1] Under the current state of the law, an indigent's

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[1] Additionally, in light of the requirements contained in 18 U.S.C. § 3006A (Supp. II 2003), there is a divergence of treatment of indigent persons charged with crimes before federal courts and those of the states.

right to such pre-trial proceedings depends entirely upon the state in which the criminal case is heard. This lack of congruence between the states raises important due process and equal protection issues for criminal defendants. The right to *ex parte* hearings under *Ake* should apply equally to all criminal defendants regardless of venue.

Petitioner John Washington Hightower ("Hightower" or "John"), is a sixty-year-old, indigent black man with no prior criminal record or history of family violence. At approximately 3:00 a.m. on Sunday, July 12, 1987, John shot and killed Dorothy Reaves, a woman whom he had recently divorced, but was continuing to live with in the same home. John also shot and killed his two stepdaughters who were asleep in another room (App. B, A71). Earlier that day, John consumed substantial amounts of alcohol and cocaine. (*Id.*) The record also indicates that he was deeply distressed and suicidal in days before and on the day of the shootings because of an argument with Dorothy. (*Id.*) John was convicted of murder in Morgan County, Georgia. He was sentenced to death on all three counts. (*Id.* at A72-A73)

I. THE *BATSON* CLAIM

During jury selection, the state prosecuting attorney, Joseph Briley, exercised seven peremptory challenges, using six against black venire members. The defense objected under *Batson*. In response, prosecutor Briley proffered ostensibly race-neutral reasons for his peremptory strikes, challenging certain black venire members based the criminal history of the jurors' family members and the putative hesitancy of a juror to impose the death penalty:

- Thelma Butler, a black female, purportedly because she was the sister-in-law of Gerald Veasley, a man whom Briley had prosecuted twelve years earlier. (App. A,

A44). Prosecutor Briley never questioned Butler about her brother-in-law or whether she knew or cared that he had been prosecuted.

- Ricky Thomas, a black male, by alleging that Thomas' father had killed his mother and that Thomas had lived with his father after his release from prison. But, Thomas testified that he did not remember his father's case because he was only a child at the time. (App. A, A43).

- Lucious Boswell, a black male, purportedly because his brother-in-law had been convicted of drug trafficking. Briley never questioned Boswell about his brother-in-law's offense. (*Id.*).

- Mattie Harris, a black female, purportedly because she expressed uncertainty about the death penalty, her son had been frequently imprisoned, her daughter had been convicted and imprisoned, and stated that she believed that someone who killed three people was sick and needed help. Briley asked Harris no questions about her children or how their problems might affect her jury service. (*Id.*).

- Emerson Davis, a black male, purportedly because he was somewhat opposed to the death penalty. Davis testified during voir dire, however, that he did not oppose capital punishment, could reserve judgment on sentence until the end of the penalty phase, believed people charged with murder should be treated fairly, and could impose the death penalty after hearing all the evidence. (*Id.*).

Briley challenged Butler, Thomas, Boswell and Harris, the black relatives of convicted criminals, while seating a

white juror, Michael Anthony Hensler, *himself* a convicted murderer. Additionally, Briley did not strike six white venire members who expressed similar views to those of black venire members Harris and Davis on the death penalty. The State's acceptance of these seven white jurors belies its proffered race-neutral rationales for striking the black jurors, whose answers to *voir dire* questions the Eleventh Circuit consistently mischaracterized or ignored.

Additionally, uncontroverted statistical analysis submitted by petitioner's expert to the district court showed that the prosecutor applied those peremptory strikes in a discriminatory manner:

> Mr. Briley's strikes appear, from a statistical perspective, to be very closely related to the prospective juror's race, and I know of no other variable that could explain them. In my professional opinion, there is a probability well in excess of 99% that Briley's six strikes of black prospective jurors in the Hightower case were made on the basis of race.

(App. E, A129-A130).

After the Superior Court of Butts County, Georgia denied Hightower's petition for a writ of habeas corpus, the Georgia Supreme Court in its appellate opinion for habeas corpus noted the trial court's ruling that Briley had articulated "legitimate non-racial reasons" for his peremptory strikes and held that, "[e]ven assuming the defendant made out a prima facie case, the trial court's determination is not clearly erroneous." *Hightower v. State*, 386 S.E.2d 509, 512 (Ga. 1989) (citation omitted).

Petitioner then petitioned to the Middle District of Georgia, which found that "Petitioner has easily satisfied the first two prongs of his prima facie burden under *Batson*; the only disputed issue is whether the totality of the circumstances raised an inference that the prosecutor peremptorily struck certain jurors because of their race." (App. E, A93.) The district court then held that because the trial court had "the best opportunity to view the prosecutor's demeanor and determine his credibility" before finding "the prosecutor's explanations to be credible," Petitioner had not met the third prong of *Batson*. (*Id.*)

On appeal, the Eleventh Circuit "assume[d] for purposes of argument (as the Georgia supreme court did) that Hightower established a prima facie case of discrimination, thereby satisfying *Batson*'s first step." *Hightower v. Schofield*, 365 F.3d 1008, 1033 (11th Cir. 2004). With regard to *Batson*'s second step, the court, mindful of the minimal burden of production required of the prosecutor, found that "[t]he prosecutor satisfied his burden of production merely by *stating* nonracial reasons for his strikes." *Id.* at 1034. Finally, with regard to *Batson*'s third step, the court "accept[ed] the finding of the Georgia courts that Hightower failed to 'establish[] purposeful discrimination.'" *Id.* (quoting *Batson*, 476 U.S. at 98).

The Eleventh Circuit recognized that the trial court "was under a duty to weigh all evidence placed before it on the question of whether the prosecutor discriminated." *Hightower v. Schofield*, 365 F. 3d at 1035. The Eleventh Circuit, however, adopted the trial court's apparent disregard of petitioner's evidence of discrimination, noting that "Hightower never provided the court with any evidence tending to discredit the persuasiveness of the prosecutor's stated reasons for striking black jurors" and that "[t]he judge was therefore free to accept the prosecutor's stated reasons at

face value." *Id.* Thus, the Eleventh Circuit erred by reviewing the trial court's findings of fact without regard to the trial court's failure to apply *Batson*'s third prong.

As Judge Wilson recognized in his concurring opinion, the approach taken by the trial court and affirmed by the Eleventh Circuit "seems to suggest that once a prosecutor has articulated reasons for his challenges, a court's finding that those reasons are race-neutral is sufficient to end the *Batson* inquiry." *Id.* at 1042 (Wilson, J., concurring).

II. AKE CLAIM

Like the defendant in *Ake*, petitioner's sole defense was his mental state at the time of the shootings.[2] As a result, his court-appointed defense counsel[3] repeatedly requested funding for psychiatric expert assistance.

Between August 31, 1987, and April 15, 1988, the court held putative *Ake* hearings in *open* court to consider petitioner's various funding requests, including this request for funds to obtain psychiatric testing and diagnosis. Over the petitioner's repeated objections and importantly, to his prejudice, the trial court allowed Mr. Briley to attend each of the hearings, actively to oppose defense counsel's funding requests, and hear the detailed summaries of defense theory and plans:

- At the first *Ake* hearing held on August 31, 1987, the court awarded petitioner $750 for an initial

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2 See App. A, A8.

3 Two weeks after the killings, the Morgan County court appointed a husband and wife team of lawyers, neither of whom had ever tried a capital case.

preliminary evaluation by a psychologist. The court advised petitioner that any further expenditure for psychiatric services would require another hearing, presumably on an *ex parte* basis. (App. A, A14). The court's decision catalyzed the prosecution during the hearing to immediately demand that the defendant be admitted to a state hospital for a psychological evaluation conducted by the State. (*Id.*). [4]

- A second *Ake* hearing was held on February 9, 1988 where petitioner requested funds for psychiatric testing and diagnosis, as recommended by the psychologist who examined him preliminarily. At this hearing, defense counsel was forced to reveal that petitioner needed to be evaluated and diagnosed by a psychiatric expert in the field of family violence. (App. A, A19-A20). Defense counsel also were forced to state that the initial examiner (who ultimately became petitioner's trial witness) could offer little assistance in properly diagnosing petitioner or "giv[ing] us some clues as to the causes of this tragedy." (App. A, A20). Although the prosecutor previously had promised not to even suggest to the court what the court allows them by way of expenses, the prosecutor argued that petitioner should receive

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[4] The State ultimately chose not to go forward with the examination. The irony, however, of the State's active participation at the first *Ake* hearing was that the State obtained the right to conduct a psychiatric evaluation of petitioner, while petitioner never received the funding necessary to procure a meaningful psychiatric evaluation and diagnosis that he could use in his defense. Ultimately, the court's refusal to provide funding for a meaningful psychiatric diagnosis an evaluation forced petitioner to rely upon the results of a preliminary evaluation by a psychologist whose professional recommendation was that the petitioner needed to be evaluated and diagnosed by someone with psychiatric expertise he did not have.

no funds for the recommended psychiatric testing and diagnosis. The court declined to provide petitioner with the requested funds to hire a psychiatrist. (App. A, A21).

- On March 9, 1988, petitioner again requested funds for the recommended psychiatric evaluation and diagnosis. Once again, the prosecutor attended the open-court hearing and actively opposed petitioner's request for funds to hire a psychiatrist. The prosecutor learned that defense counsel had made no further progress in their defenses based on petitioner's mental state. (App. A, A24). The prosecutor summarized his understanding of petitioner's defense theory and argued aggressively that petitioner should not be given additional funds for psychiatric evaluation and diagnosis.[5] Once again, petitioner's *Ake* request for funds to hire a psychiatrist was denied. (*Id.*).

- With his trial scheduled to commence on April 28, 1988, petitioner again requested funds, on April 15, 1988, to hire a psychiatrist who could evaluate him and assist defense counsel in understanding the causes of the shootings. The prosecutor again was permitted to attend the open-court *Ake* hearing. In its opinion upholding petitioner's conviction and

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5 The prosecutor Mr. Briley argued in part:

> ... There has been no showing to the Court in my presence, now, I know that they don't have to show it in my presence, but there has been nothing to show this defendant is psychiatrically deprived and that he is unable to stand trial at this time, so it must be going to mitigation.

(App. A, A24).

> sentence, the Georgia Supreme Court held that "[t]he defendant has not shown any harm from the denial of an *ex parte* hearing on the funds issue." *Hightower v. State*, 386 S.E.2d at 511. The court never explained why petitioner's case was not covered by its earlier holding in *Brooks v. State*, 385 S.E.2d 81 (Ga. 1989), *cert. denied*, 494 U.S. 1018 (1990). [6] The court also never explained how harmless error could exist where petitioner's sanity at the time of the offense would be a significant factor, and indeed, the sole defense during the guilt phase of trial and used in mitigation hearing during the penalty phase.

On January 18, 1994, the Superior Court of Butts County, Georgia denied Hightower's petition for a writ of habeas corpus. *Hightower v. Zant*, No. 91-CV-3713 (Ga. Super. Ct. Butts County). The habeas court never addressed petitioner's argument. Instead, it simply signed proposed findings of fact and conclusions of law submitted by the State, which did not even address petitioner's contention. (App. B, A80).

In his application to the Georgia Supreme Court for a certificate of probable cause to appeal, petitioner repeated his argument that the trial court's failure to hold *ex parte* hearings on his *Ake* requests violated his federal constitutional rights. The Georgia Supreme Court denied petitioner's application for a certificate of probable cause to appeal on November 3, 1994, and further denied petitioner's

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6 "[A]cknowledging the right of the indigent defendant to obtain the expert assistance necessary to assist in preparing his defense .... The defendant also has the right to obtain that assistance *without losing the opportunity to prepare the defense in secret.* Otherwise the defendant's 'fair opportunity to present his defense,' acknowledged in *Ake*, will be impaired." *Brooks*, 385 S.E.2d at 84 (emphasis added).

motion for reconsideration on December 2, 1994. Petitioner's appeals to the federal district court and Eleventh Circuit were likewise denied.

The Eleventh Circuit erred by failing to recognize that the trial court never applied *Batson*'s third prong, which likely would have revealed prosecutor Briley's flawed reasoning. Instead, the Eleventh Circuit focused on the trial court's findings of fact. As a result, the trial court's flawed *Batson* analysis passed through the chain of review unchanged. The Eleventh Circuit also erred under *Ake* by failing to protect petitioner's due process, equal protection, and right against self-incrimination by deferring to the state's resolution for an appropriate *ex parte* hearing.

REASONS FOR GRANTING THE PETITION

I. THE FAILURE TO WEIGH THE STATE'S PROFFERED RACE-NEUTRAL REASONS FOR EXERCISING PEREMPTORY STRIKES AGAINST A DEFENDANT'S EVIDENCE OF DISCRIMINATORY INTENT CIRCUMVENTS THE PROTECTIONS THIS COURT ESTABLISHED IN *BATSON*

In evaluating petitioner's *Batson* claim, the Eleventh Circuit failed to apply the third prong of the *Batson* analysis as established by this Court.[7] In *Batson*, this Court held that the state, in the person of the prosecuting attorney, violates the Equal Protection Clause of the Fourteenth Amendment by striking jurors peremptorily on account of their race. *Batson*, 476 U.S. at 89. To guard against such violations, this Court set forth a distinct three-part test. First, the defendant must make a prima facie case of discrimination. *Id.* at 96. Second, after the defendant has made a prima facie case, the state must "come forward with a neutral explanation for challenging black jurors." *Id.* at 97. Third, the judge must decide whether the prosecutor purposefully discriminated against jurors on account of their race through the use of peremptory strikes. *Id.* at 98. The trial court, however, made no effort to determine whether prosecutor Briley exercised his peremptory strikes in a discriminatory manner to strike prospective black jurors, instead accepting Briley's proffered race-neutral reasons without further inquiry. (App. A, A47-A49).

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[7] A similar *Batson* question is before this Court in *Miller-El v. Dretke*, 153 F.3d 1086 (10th Cir. 1998), *cert. granted*, 124 S. Ct. 2908 (2004), Appeal No. 03-9659, on writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

A. The Eleventh Circuit Ignored the Trial Court's Failure to Perform a "Similarly Situated" Analysis Between Black and White Jurors to Test the Race-Neutrality of the Prosecutor's Peremptory Strikes

In evaluating *Batson* claims, courts must consider "all relevant circumstances" in determining whether the prosecution has exercised a peremptory strike for a discriminatory reason. *Batson*, 476 U.S. at 96-97. A consideration of all relevant circumstances may include, *inter alia*, comparing the attributes of stricken black jurors with those of seated white jurors. *See, e.g., United States v. Stewart*, 65 F.3d 918, 926 (11th Cir. 1995), *cert. denied*, 516 U.S. 1134 (1996); *Hollingsworth v. Burton*, 30 F.3d 109, 12 (11th Cir. 1994), *cert. denied*, 513 U.S. 1131 (1995); *United States v. Bennett*, 928 F.2d 1548, 1551 (11th Cir. 1991); *United States v. Horsley*, 864 F.2d 1543, 1544-46 (11th Cir. 1989). Where the reason offered for a strike applies equally to jurors of a different race who were not struck, the circumstances indicate that the proffered justification was pretextual and that the juror was actually struck on account of race. *See Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997) ("A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination.").

Here, the Eleventh Circuit failed to question that *the trial court never conducted **any** analysis as required by Batson's third prong.* Certainly, the trial court never compared the attributes of the black jurors against whom Briley exercised his peremptory strikes against those of the white jurors Briley allowed to serve. The trial court simply ignored the fact that a white ex-convict was seated on the jury. In fact, the trial court uncritically accepted each of

Briley's proffered explanations without making any inquiry into whether they applied to jurors he did not strike. (T. 619-25). *See Garrett v. Morris*, 815 F.2d 509, 514 (8th Cir.) ("[t]he trial court's immediate acceptance of [the prosecutor's] explanation at face value compounds our concern about the adequacy and genuineness of the proffered explanation."), *cert. denied*, 484 U.S. 898 (1987).

Because the trial court never performed a proper *Batson* analysis, the Eleventh Circuit erred by not remanding the case back for application of *Batson*'s third prong. *See Coulter v. Gilmore*, 155 F.3d 912 (7th Cir. 1998). In *Coulter*, the Seventh Circuit offered the following analysis, which applies equally to Petitioner's case:

> Because of the trial court's failure to consider the totality of the circumstances, it never evaluated the differential manner in which the state handled – or rather, failed to handle – nonminority jurors who were similarly situated to the African-Americans the prosecution struck. *A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate African-American prospective jurors and not others who also have that characteristic.* ... Regrettably, the juror-by-juror inquiry that the trial judge conducted, unsupplemented by any final look at the record as a whole despite counsel's efforts to present this evidence to the court, practically guaranteed the conclusion that the prosecution was acting race neutrally. . . . *Batson* requires more: *somehow, at some point, the trial court must evaluate the broader pattern of strikes, so that it can detect situations ... where prospective jurors arguably are being treated dissimilarly for their non-minority counterparts.*

> We therefore hold that the state trial court violated *Batson* by adhering to a procedure that precluded it – both as a systematic matter and in fact – from performing a "similarly situated" analysis based on the "totality of the circumstances."

Id. at 921 (emphasis added; citations omitted). Because the trial court abdicated the third-prong analysis *Batson* and the Constitution require, its conclusions lack foundation and the Eleventh Circuit erred in deferring to the state courts' resolution of petitioner's claim. *See Lajoie v. Thompson*, 217 F.3d 663, 670 (9th Cir. 2000) (state court's failure to follow analysis prescribed by the Supreme Court is "an unreasonable application of clearly established federal law, as determined by the United States Supreme Court"); *Hogan v. Gibson*, 197 F.3d 1297, 1306 (10th Cir. 1999) (reversal mandated where state court "*never* engage[d] in the correct inquiry"), *cert. denied*, 531 U.S. 940 (2000).

B. Under the Proper Analysis, The Evidence Establishes Discriminatory Exercise Of Peremptory Strikes

Petitioner is entitled to relief even if only one of the prosecutor's strikes was racially motivated. "[U]nder *Batson*, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown." *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986); *accord Allen v. Lee*, 366 F.3d 319, 358 (4th Cir.) (*en banc*), *cert. denied*, 73 U.S.L.W. 3213 (U.S. Oct. 4, 2004); *United States v. Brown*, 352 F.3d 654, 662 n.5 (2d Cir. 2003); *United States v. Harris*, 192 F.3d 580, 587 (6th Cir. 1999); *Turner v. Marshall*, 121 F.3d at 1258 n.4; *Cochran v. Herring*, 43 F.3d 1404, 1412 (11th Cir. 1995), *cert. denied*, 516 U.S. 1073

(1996); *United States v. Matha*, 915 F.2d 1220, 1221 (8th Cir. 1990). Thus, the fact that three of the jurors on Petitioner's jury were black does not bar a finding of a *Batson* violation. *See Cochran*, 43 F.3d at 1412 ("although the seating of blacks on the jury is a significant fact, it does not bar a finding of racial discrimination"); *accord Stewart*, 65 F.3d at 926 ("*Batson* is not about numbers *per se*. It is about ending racial discrimination . . . .").

The proper inquiry compels the conclusion that Petitioner has made out a prima facie *Batson* violation. Considered together, all the circumstances indicate that prosecutor Briley illegally used his peremptory strikes to remove black venire members from Petitioner's jury on account of race.

1. Statistical Evidence of Discrimination

At the federal habeas proceeding, Hightower submitted statistical evidence in the form of a report prepared by Dr. Gary Liberson, a statistician with experience in capital habeas cases. The district court ignored Dr. Liberson's report, neither citing it in its opinion nor otherwise addressing Dr. Liberson's findings. Dr. Liberson's report, however, provided uncontroverted evidence that (1) if Briley had truly exercised his peremptory strikes without regard to race, the probability that he would exercise at least 6 out of 7 peremptory strikes against black members of the initial pool of 42 potential jurors (consisting of 28 whites and 14 blacks) is only 1 in 308 and (2) if the sample is reduced to the 35 prospective jurors (24 whites and 11 blacks) who were actually considered, the likelihood that at least 6 out of 7 strikes would be used against black jurors falls to 1 in 589. (App. E, A126).

Considering the totality of Briley's strikes against the background of the jury venire, Dr. Liberson concluded

> that it is extremely unlikely – far less than a 1% probability, from a statistical perspective – that Mr. Briley's peremptory strikes were exercised in a race-neutral manner in the Hightower case. Briley's strikes appear, from a statistical perspective, to be very closely related to the prospective juror's race, and I know of no other variable that could explain them. In my professional opinion, there is a probability well in excess of 99% that Briley's six strikes of black prospective jurors in the Hightower case were made on the basis of race.

(*Id.*, A129-A130). This statistical evidence was uncontested and it bears substantially on the question whether "all relevant circumstances" point toward an inference of discrimination in Briley's exercise of his peremptory strikes. Yet the lower courts and the Eleventh Circuit ignored this evidence.

2. Lack of Record Support for the Proffered Justifications

In almost no instance were the prosecution's proffered justifications for the strikes supported by any record evidence. As other circuits have held, this lack of support casts substantial doubt upon whether the stated reasons were genuine or, instead, were offered merely to cover the prosecutor's discriminatory purpose. *See Ford v. Norris*, 67 F.3d 162, 169-70 (8th Cir. 1995); *see also Splunge v. Clark*, 960 F.2d 705, 708-09 (7th Cir. 1992); *Garrett*, 815 F.2d at 514. When a prosecutor fails to question a prospective juror about the subject the prosecutor later

invokes to justify a peremptory strike against that juror, the prosecutor's lack of interest in the subject suggests that the stated reason was pretextual. *See United States v. Brown*, 817 F.2d 674, 676 (10th Cir. 1987) (finding *Batson* violation where prosecutor struck two black jurors without making any "effort [during voir dire] to determine whether his [alleged concerns] were real"). A review of the trial record shows that Briley failed to question at least five of the struck prospective black jurors on the subjects he identified as the bases for the strikes. (App. A, A48). The lack of evidence supporting Briley's explanations for his disproportionate use of peremptory strikes against black prospective jurors undercuts the state courts' acceptance of his proffered reasons. Accordingly, the Eleventh Circuit employed an incorrect legal standard and affirmed a ruling that used a legally flawed analysis.

II. THE DENIAL OF *EX PARTE* HEARINGS TO INDIGENT CAPITAL DEFENDANTS RESTRICTS THE SAME RIGHTS *AKE* PROTECTS

The Eleventh Circuit erred in affirming the state court's resolution of petitioner's *Ake* claim for an appropriate *ex parte* hearing. Conflict exists at the state level as to whether *ex parte* hearings[8] are a substantive part of the *Ake* right, or merely a procedural option left to the discretion of the states. *Ake* held that due process requires that a state

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[8] The meaning of "*ex parte* proceeding" is well established. *See, e.g., United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974). Black's Law Dictionary defines it as a "proceeding in which not all parties are present or given the opportunity to be heard." *Black's Law Dictionary* 1241 (8th ed. 2004). It further defines "*ex parte*" as "done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested." *Id.* at 616.

provide an indigent defendant access to the assistance of a psychiatrist when the defendant has made a preliminary showing that his sanity at the time of the offense is a significant factor. *Ake v. Oklahoma*, 470 U.S. at 80. The Court based this conclusion on the long recognized principle that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Id.* at 76.

The Court specifically contemplated the use of *ex parte* hearings for the initial "significant factor" showing by the defendant, stating: "When the defendant is able to make an ***ex parte*** threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." *Id.* at 82-83. (emphasis added).

Despite this Court's express contemplation of *ex parte* hearings, the states have split in deciding whether *ex parte* hearings are mandatory when an indigent defendant requests funds for expert psychiatric assistance. The federal government mandates the provision of indigent defendants expert services following an *ex parte* hearing (*see* 18 U.S.C. § 3006A (Supp. 2003)), but the states have not uniformly followed the Congressional lead.[9]

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[9] Although federal procedural law is ordinarily not binding on state courts (*see Erie R.R .v. Tompkins*, 304 U.S. 64, 78-79 (1938)), the rule is different where there is a constitutional imperative. Note for example, how the Sixth Circuit Court of Appeals has applied Federal Rule of Criminal Procedure 17(b) which requires *ex parte* examination of a defendant's need for expert assistance. Providing constitutional support for the safeguards provided to indigent criminal defendants under Rule 17(b), the Sixth Circuit stated:

Indiana, Virginia, South Dakota and Arizona have expressly rejected any constitutional basis for *ex parte* hearings.[10] Alabama, Georgia, Hawaii, North Carolina,

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> [I]t is important to bear in mind that the right of an indigent criminal defendant to subpoena witnesses rests not only on Rule 17(b), but also on the Sixth Amendment right to compulsory process, and on the Fifth Amendment right not to be subjected to disabilities by the criminal justice system because of financial status. *United States v. Barker*, 553 F.2d 1013, 1019 (6th Cir. 1977).

See Karla C. McGrath, Note, *Sommers v. Commonwealth: An Indigent Criminal Defendant's Right to Publicly Funded Expert Assistance Other than the Assistance of Counsel*, 84 Ky. L.J. 387, 407-08 (Winter 1995/1996) (citing *Barker*, 553 F.2d at 1019) (citing *United States v. Rigdon*, 459 F.2d 379, 382 (6th Cir. 1972), *cert. denied*, 409 U.S. 116 (1973)). *Barker* further explained that "necessity . . . cannot in most instances be anticipated at the outset of a trial, at least without a complete disclosure of the theory of the defense. [The 1966 amendment to Rule 17(b)] was intended to avoid the requirement that a defendant make such a disclosure in order to obtain subpoenas." *United States v. Barker*, 553 F.2d 1013, 1020 (6th Cir. 1977).

[10] Indiana has held that there is "no automatic constitutional entitlement to such *ex parte* proceedings," instead finding only "that **strategic considerations** will often lead defense counsel to **prefer** secrecy as to their funding requests." *Stevens v. State*, 70 N.E.2d 739, 759 (Ind. 2002)(emphasis added), *cert. denied*, 124 S. Ct. 69 (2003). The Arizona Supreme Court in *State v. Apelt*, 861 P.2d 634, 649-50 (Ariz. 1993), *cert. denied*, 513 U.S. 834 (1994), determined that neither the Fourteenth Amendment's guarantee of due process nor that of equal protection entitles defendants to an *ex parte* hearing. Citing a similar judicial conduct canon as found in *Stevens*, the Arizona court determined that *ex parte* communications are forbidden except where authorized by law, and as there were neither statutory nor organic law authorizing such a procedure the trial court did not err in refusing to conduct the hearing *ex parte*. *See also State v. Floody*, 481 N.W.2d 242, 256 (S.D. 1992)(no constitutional grounds for *ex parte* hearing); *Ramdass v. Commonwealth*, 437 S.E.2d 566, 570 (Va. 1993) rejecting both federal and state

Oklahoma, Tennessee, and Texas have decided that defendants are entitled to an unqualified *ex parte* hearing concluding that indigent defendants should not be required to reveal a defense theory or the identity of experts who are consulted but who may not testify at trial.[11] California, Delaware, Kansas, Nevada, New York, South Carolina, Minnesota and Tennessee have enacted statutes requiring *ex parte* hearings.[12] Louisiana and Ohio have held that *ex parte*

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constitutional arguments for an *ex parte* hearing), *vacated on other grounds*, 512 U.S. 1217 (1994).

[11] *See Ex parte Moody*, 684 So. 2d 114, 120 (Ala. 1996) (criminal defendant entitled to *ex parte* hearing on whether expert assistance is necessary based on Fifth, Sixth, Fourteenth Amendments to Constitution); *Brooks v. State*, 385 S.E.2d at 84 (indigent defendant entitled to *ex parte* hearing to determine entitlement to public funds); *Arnold v. Higa*, 600 P.2d 1383, 1385 (Haw. 1979) (indigent defendant entitled to *ex parte* hearing so that he can demonstrate indigency or particularize reasons for request for litigation expenses without disclosing defensive theories to State); *State v. Ballard*, 428 S.E.2d 178, 180 (N.C.), *cert. denied*, 114 S. Ct. 487 (1993) (holding that the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution guaranteed and entitled an indigent defendant to an ex parte hearing on his request for a psychiatric expert); *McGregor v. State*, 733 P.2d 416, 416-17 (Okla. Crim. App. 1987) (holding hearing to determine if defendant was entitled to court-appointed psychiatrist on motion must be *ex parte*); *State v. Barnett*, 909 S.W.2d 423, 429 (Tenn. 1995) (holding that when indigent defendant seeks psychiatric assistance, the hearing should be *ex parte*); *Williams v. State*, 958 S.W.2d 186, 193-94 (Tex. Crim. App. 1997) (deciding that an indigent defendant is allowed an *ex parte* proceeding because the defendant should not have to disclose defensive theories to prosecution in order to obtain "basic tools of an adequate defense").

[12] See Cal. Penal Code § 987.9 (West Supp. 2004) (requiring *in camera* review for such requests); Del. Super. Ct. Crim. R. 44(e) (2004) (requiring *ex parte* hearings); Kan. Stat. Ann. § 22-4508 (2003) (same); Minn. Stat. § 611.21 (2003)(same); Nev. Rev. Stat. § 7.135 (2004) (same); N.Y. County Laws § 722-c (2004) (same); S.C. Code Ann. § 16-3-26(C) (2003) (same); Tenn. Code Ann. § 40-14-207(b) (2004) (same). South Carolina and Tennessee have found *ex parte* hearings permissible

hearings may be warranted in certain circumstances.[13] Finally, the law is unclear in Wisconsin.[14]

Prior to this case, Georgia had aligned itself with the states (and 18 U.S.C. § 3006A) that recognize the constitutional requirement of *ex parte* hearings. *See Brooks*, 385 S.E.2d at 84 ("[t]he defendant . . . has the right to obtain [expert] assistance without losing the opportunity to prepare the defense in secret. Otherwise, the defendant's 'fair opportunity to present his defense,' acknowledged in *Ake*, [is] impaired"). Petitioner was not accorded the protections contemplated by *Ake* or *Brooks*. The prosecutor's attendance and participation in petitioner's *Ake* hearings denied petitioner his right to confidential preparation of his defense and otherwise killed the ability of petitioner's counsel to articulate their client's needs.

Absent an *ex parte* hearing, indigent defendants in a capital case are presented with a constitutionally impermissible dilemma: pursue their *Ake* rights fully and give the prosecution early court-sponsored discovery of their

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under state statute, but not required by the United States Constitution. *See Ex parte Lexington County*, 442 S.E.2d 589 (S.C. 1994); *State v. Smith*, 857 S.W.2d 1, 12 (Tenn.), *cert denied*, 510 U.S. 996 (1993).

[13] Louisiana has recognized a constitutional basis for allowing an *ex parte* proceeding, but requires a defendant to first demonstrate a particularized prejudice to the defendant from holding an adversarial hearing. *See State v. Touchet*, 642 So. 2d 1213 (La. 1994). *See also State v. Peeples*, 640 N.E.2d 208, 212 (Ohio Ct. App. 1994) ("While an ex parte hearing may be necessary at times to protect counsel's defense strategy, *Ake*, *supra*, there is no indication that such a hearing was necessary in this case.").

[14] In Wisconsin, state courts have the discretion to hold *Ake* hearings *ex parte*. *Payment of Witness Fees v. Brenizer*, 524 N.W.2d 389 (Wis. 1994).

defense theories and activities, or forgo their constitutional rights. In contrast to the nondiscretionary federal law treatment of indigent persons, this Court could not have intended to give states the discretion to diminish the scope of availability of the due process rights discussed in *Ake*.[15] Nor would it be constitutionally permissible under the equal protection clause to give indigent capital defendants in some states a better opportunity to pursue their constitutional rights than capital defendants receive in states where *ex parte* hearings are not guaranteed.

Nearly two decades of state court conflict requires this Court's resolution. Unless the decision of the Eleventh Circuit is reversed, some states will continue to view *ex parte* hearings in capital cases as merely an optional corollary to the *Ake* right, and the important federal questions presented by this case and the conflicting rulings of various states courts of last resort, as well as those of the federal courts, will be revisited time and again. The established right of an indigent capital defendant (such as petitioner) to obtain funds for psychiatric expert services will hinge upon random and arbitrary processes wholly dependent upon the state and court in which he or she happens to be tried. The Constitution precludes this haphazard and arbitrary treatment of indigent capital defendants.

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[15] On the contrary, the Court in *Ake* cites 18 U.S.C. § 3006A along with more than 40 state cases or statutes to underscore the comparative scope of rights available to indigent defendants. *Ake*, 470 U.S. at 78 n.4.

A. THE DENIAL OF *EX PARTE* HEARINGS TO INDIGENT CAPITAL DEFENDANTS RESTRICTS THE SAME CONSTITUTIONAL RIGHTS *AKE* STRIVES TO ASSURE

Without mandatory *ex parte* hearings, *Ake* is only a mirage for indigent capital defendants such as petitioner.[16] *Ake* is rooted in the notion that the adversary process requires all defendants to have access to the "basic tools" necessary for an adequate defense. 470 U.S. at 77. Consequently, *Ake* supplements the core right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963), by placing psychiatric assistance within the parcel of "basic tools" available to the defense. As with the right to counsel, access to psychiatric assistance is necessary to secure a fair trial with reliable results: "[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense . . . the risk of an inaccurate resolution . . . is extremely high." 470 U.S. at 82..

Many cases, *Ake* among them, have relied on the three-part due process inquiry the Court established in *Matthews v. Eldrige*, 424 U.S. 319 (1976).[17] The *Matthews*

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16 *See* Donna H. Lee, Note, *In the Wake of Ake v. Oklahoma: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. Rev. 154, 187 (1992) ("Whether the process for determining need is *ex parte* impacts on [sic] the defendant's interest in presenting clearly and forthrightly all evidence of need.").

17 470 U.S. at 77-84. The three factors set forth in *Matthews* include:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

factors mandate that *Ake* hearings be conducted *ex parte*. The arbitrary constitutional violations resulting from the conflict and chaos in the states makes this issue especially worthy of review.

As to the first *Matthews* prong, the Court recognized in *Ake* that a defendant's interest in the accuracy of the outcome of his or her own criminal trial is "almost uniquely compelling." *Ake*, 470 U.S. at 78. Forcing an indigent capital defendant to present his or her request for funds in the presence of the prosecution, and allowing the prosecution to argue against those requests, opens a window into defense counsel's theories, work product, and confidences.

The second part of *Matthews'* due process test measures the likely significance of the proposed procedural safeguards. Mandatory *ex parte* hearings in a capital case prevents the prosecution from gaining advance knowledge of the defense strategy and from influencing whether defendants such as petitioner receive funding for psychiatric expert services.

The last *Matthews* due process prong is the government interest that will be affected if the safeguard is provided. Although the State may have a financial interest in limiting expenditures, barring the prosecution from *Ake* hearings would not prejudice the State's interest because the prosecution may protect the public at the defendant's indigency hearing. *Ake* recognized that the State has no legitimate interest in gaining an unfair advantage over the defense. *See* 470 U.S. at 79.

When hearings are not conducted ex parte, indigent capital defendants are subjected to pretrial scrutiny by the

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Matthews, 424 U.S. at 335.

prosecution while defendants who are able to pay their own counsel fees are not. This differential in pretrial scrutiny raises serious equal protection concerns. *See. e.g., Meriwether*, 486 F.2d at 506; *Brooks*, 385 S.E.2d at 83. *See generally* Lee, *supra* note 17, at 186 n.210 and cases cited therein. There should be equality between "indigents and those who possess the means to protect their rights." *United States v. Tate*, 419 F.2d 131 (6th Cir. 1969).

B. PETITIONER'S CHOICE TO GIVE UP THE RIGHT TO PREPARE HIS DEFENSE DEFEATS ANY ARGUMENT OF HARMLESS ERRORS

Should the Court find that petitioner was entitled to psychiatric assistance, petitioner's choice to give up the right to prepare his defense in confidence defeats any argument of harmless error. This court held long ago that error is harmless if it did not have a substantial or injurious effect or influence on the jury's verdict. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Error will not be deemed harmless if there is significant doubt that the evidence would have caused at least one juror to change his verdict or choose life rather than death. *See Moore v. Reynolds*, 153 F.3d 1086, 1110 (10th Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999).

Error with respect to the guilt stage of petitioner's trial is not harmless because the record evidence reveals that an insanity plea was his sole defense. Without the assistance of a psychiatrist, petitioner had no opportunity to confidentially develop or present evidence relative to his intent. The Government should be precluded from injecting itself into defense preparation and, in effect, shaping it to the government's advantage. Further, the error was not harmless relative to the penalty stage because there was, at least,

significant doubt created that the evidence may have caused at least one juror to choose life rather than death.

Harm to an indigent capital defendant inevitably flows from the prosecution's attendance at an *Ake* hearing. The critical issue is that the object of adversarial scrutiny is not mere physical evidence, but the defendant himself. The matter is not tactile and objective, but one of an intensely sensitive, personal nature. The public, adversarial nature of an open hearing is inevitably intimidating when the issue is the defendant's mental instability. This atmosphere can chill the defendant's desire to put before the trial court all his evidence in support of his motion. *See State v. Ballard*, 428 S.E.2d at 180-181. It also allows the prosecution to unfairly frame the defendant's case in a manner most advantageous to the government. The Constitution confers no such authority to the government over defendants in criminal proceedings.

In sum, this case presents substantial constitutional issues, the resolution of which are of consequence to this case and many other cases nationwide. Error should be assigned to the Eleventh Circuit's ruling for upholding the state courts' abdication of the third-prong analysis as *Batson* and the Constitution requires. Finally, the Eleventh Circuit also erred by allowing the prosecutor's attendance and participation in petitioner's *Ake* hearings denying petitioner his right to confidential preparation of his defense.

Accordingly, this Court's review is warranted.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and order that habeas corpus relief be granted to petitioner.

Respectfully submitted.

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NOVEMBER 2004

APPENDIX

APPENDIX A

No. 00-15807

IN THE
UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

D.C. Docket No. 96-00097-3:CV-DF

JOHN WASHINGTON HIGHTOWER,
Petitioner-Appellant,

v.

DERRICK SCHOFIELD,
Respondent-Appellee,

Appeal from the United States District Court
for the Middle District of Georgia

(April 12, 2004)
Before TJOFLAT, ANDERSON and Wilson, Circuit Judges.

TJOFLAT, Circuit Judge.

Petitioner John Washington Hightower, a Georgia prisoner, seeks a writ of habeas corpus setting aside his 1988 convictions and sentences for capital murder. The district court denied his petition. We affirm.

I.

The Supreme Court of Georgia summarized the facts of this case as follows:

> The defendant was married to Dorothy Hightower. Her brother stopped by their home early in the morning of July 12, 1987, to pick up his daughter. Dorothy Hightower's car was gone. The brother entered the home and found that Dorothy Hightower and her two daughters, Evelyn and Sandra Reaves, had been shot. Evelyn Reaves was still alive, but died two days later. Sandra Reaves and Dorothy Hightower were dead. The brother's daughter was unharmed.
>
> Two and one-half hours later, the defendant was arrested driving his wife's car. Inside the car was a bloody handgun. He confessed later that morning. He told police that he and his wife had been having marital problems, and he had purchased the murder weapon the day before. He hid it under his pillow until 3:00 a.m., when he shot his wife. He then went to the bedroom occupied by his stepdaughter Sandra Reaves. She got out of bed, but then lay back down. He shot her in the head. Evelyn Reaves tried to leave the house, but the defendant caught her and shot her three times.

Hightower v. State, 386 S.E.2d 509, 510 (Ga. 1989).

After a trial held from April 28, 1988, to May 4, 1988, a jury in Morgan County, Georgia,[1] convicted Hightower of three counts of murder. In the penalty phase, the jury found an aggravating circumstance as to each murder, namely, that Hightower had committed each murder in the course of the commission of another murder.[2] The jury recommended death sentences on each of the three counts of murder. The trial court entered these sentences as required by Georgia law.[3]

Hightower sought, but was denied, a new trial. The Georgia Supreme Court affirmed Hightower's convictions on direct appeal, *Hightower v. State*, 386 S.E.2d 509 (Ga. 1989),

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[1] Hightower was indicted in Baldwin County on July 14, 1987. At a hearing on January 15, 1988, the superior court granted Hightower's motion for a change of venue, and ordered that venue be changed to Morgan County for trial. On February 25, 1988, the court quashed the indictment on the ground that African-Americans were underrepresented on the venire from which the grand jury had been drawn. A new indictment was returned on March 18, 1988, and Hightower was arraigned on April 15, 1988. On April 20, 1988, the superior court issued an order *nunc pro tunc* January 15, 1988, incorporating into the record of the new case all motions, orders, and rulings from the earlier case.

[2] O.C.G.A. § 17-10-31 requires that a death sentence be supported by "a finding of at least one statutory aggravating circumstance." One sufficient aggravating circumstance for murder is that it "was committed while the offender was engaged in the commission of another capital felony or aggravated battery." O.C.G.A. § 17-10-30. Hightower's jury found that (1) the murder of Dorothy Hightower was committed while Hightower was engaged the commission of the murder of Evelyn Reaves, (2) the murder of Sandra Reaves was committed while Hightower was engaged in the commission of the murder of Dorothy Hightower, and (3) the murder of Evelyn Reaves was committed while Hightower was engaged in the commission of the murder of Sandra Reaves.

[3] O.C.G.A. § 17-10-31 provides that "[w]here a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death."

and denied his motion for reconsideration. The Supreme Court of the United States denied Hightower's petition for a writ of certiorari, *Hightower v. Georgia*, 498 U.S. 882, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990), and his petition for rehearing, *Hightower v. Georgia*, 498 U.S. 995, 111 S.Ct. 549, 112 L.Ed.2d 557 (1990).

Hightower then petitioned the Superior Court of Butts County, Georgia, for a writ of habeas corpus.[4] After an evidentiary hearing, the court denied his petition. The Georgia Supreme Court denied Hightower's application for probable cause to appeal and his subsequent motion for reconsideration. The Supreme Court of the United States denied Hightower's petition for a writ of certiorari, *Hightower v. Thomas*, 515 U.S. 1162, 115 S.Ct. 2618, 132 L.Ed.2d 860 (1995), and his petition for rehearing, *Hightower v. Thomas*, 515 U.S. 1183, 116 S.Ct. 30, 132 L.Ed.2d 912 (1995).

Having pursued all state court avenues of relief, Hightower sought habeas corpus relief in the United States District Court for the Middle District of Georgia. The district court denied his petition, concluding on the basis of the records of the state court proceedings that none of his claims had merit.[5] The district court thereafter granted Hightower's application for a certificate of appealability pursuant to 28 U.S.C. § 2253(c), concluding that he had made a "substantial showing of the denial of a constitutional right" with respect to each of his claims. In this appeal, however, Hightower challenges the district court's disposition only of a portion of

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[4] Hightower, petitioned that court because he was incarcerated in Butts County.

[5] The court also denied Hightower's Federal Rule of Civil Procedure 59(e) motion to alter and amend the judgment.

his claims.[6] He contends that the state trial court committed constitutional error by (1) failing to provide him with the assistance of a qualified psychiatrist as required by *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and by neglecting to conduct hearings on his *Ake* requests *ex parte*; (2) allowing the prosecutor peremptorily to strike African-Americans from the jury, in contravention of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); and (3) permitting jurors unconstitutionally biased in favor of the death penalty to serve on his jury. He also claims that his two court-appointed lawyers provided constitutionally ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

II.

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, which amended the federal habeas corpus provisions of 28 U.S.C. § 2254. Because Hightower filed his habeas petition after the

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6 Hightower has abandoned the following claims by not including them in his brief: (1) the prosecutor engaged in various forms of misconduct before and during the trial, depriving him of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to a fair trial and a reliable sentencing proceeding; (2) the trial court violated his rights under the Fifth and Fourteenth Amendments by failing to have all proceedings against him transcribed and made part of the record; (3) the State obtained his confession and used it against him at trial in contravention of the Fifth, Sixth, Eighth, and Fourteenth Amendments; (4) the trial court violated his rights under the Eighth and Fourteenth Amendments by providing misleading and incomplete instructions to the jury during the penalty phase of his trial; (5) the trial court violated his Fourteenth Amendment due process rights by allowing the prosecutor to introduce allegedly inflammatory victim impact evidence; and (6) his attorneys were constitutionally ineffective in numerous ways beyond those cited in his brief to us.

AEDPA's effective date, that law's provisions apply. *Penry v. Johnson*, 532 U.S. 782, 792, 121 S.Ct. 1910, 1918, 150 L.Ed.2d 9 (2001).

As amended by AEDPA, 28 U.S.C. § 2254 states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As the Supreme Court has held,

> [u]nder the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state

> court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000). The phrase "clearly established Federal law," as that term appears in section 2254(d)(1), "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision." *Id.* at 412, 120 S.Ct. at 1523. Furthermore, a habeas petitioner can overcome a state court's "presumption of correctness" on factual determinations only by coming forth with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

As a general rule, in reviewing a district court's grant or denial of a habeas petition, we review the district court's findings of fact for clear error, and review *de novo* both questions of law and mixed questions of law and fact. *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000). In this case, because the district court "neither held an evidentiary hearing nor made any independent findings of fact," we review its holdings *de novo*, mindful that "we (like the district court) are reviewing, in essence, [the] decision[s] of the courts of Georgia." *Putman v. Head*, 268 F.3d 1223, 1240 (11th Cir. 2001).

III.

Hightower raises two separate claims under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). We address these in turn.

A.

Hightower first claims that he was denied his rights under *Ake* to the assistance of a competent psychiatrist.

Hightower unsuccessfully raised this claim on direct appeal to the Georgia Supreme Court.[7] *Hightower v. State*, 386 S.E.2d 509, 511 (Ga. 1989). Thus, under 28 U.S.C. § 2254(d), for Hightower to prevail on this claim, the decision of the Georgia Supreme Court must have been "contrary to, or. . . an unreasonable application of, clearly established" United States Supreme Court precedent, or "based on an unreasonable determination of the facts in light of the evidence." We hold that it was not. Because Hightower failed to make the threshold showing required to trigger his rights under *Ake*, and received defense funds that he could have used for a psychiatric expert, his claim fails.

The Supreme Court in *Ake* considered the constitutional right of indigent criminal defendants to psychiatric assistance. In that case, Ake, the defendant, notified the trial court during a pretrial conference of his intention to raise an insanity defense, and requested the appointment of, or funds to hire, a psychiatrist. *Ake*, 470 U.S. at 72, 105 S.Ct. at 1090. The court denied the request. *Id.* at 72, 105 S.Ct. at 1090-91. At the guilt phase of Ake's trial, "there was no expert testimony for either side on Ake's sanity at the time of the offense," even though "his sole defense was insanity." *Id.* at 72, 105 S.Ct. at 1091 (emphasis omitted). The jury found him guilty. *Id.* at 73, 105 S.Ct. at 1091. At the sentencing phase, Ake, without a psychiatric expert, could not rebut the testimony of state psychiatrists who claimed he was "dangerous to society," and could not "introduce on his behalf [psychiatric] evidence in mitigation

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[7] Hightower later brought this claim before the Superior Court of Butts County. That court refused to review the claim, citing *Gunter v. Hickman*, 348 S.E.2d 644 (Ga. 1986). *Gunter* held that an "issue. . . actually litigated, i.e., raised and decided [on] direct appeal . . . cannot be reasserted in habeas corpus proceedings" in Georgia state courts. *Id.* at 644-45 (citations omitted).

of his punishment." *Id.* at 72, 105 S.Ct. at 1091. The jury returned a death sentence. *Id.*

The Supreme Court ruled in Ake's favor, holding under the Due Process Clause of the Fourteenth Amendment

> that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

470 U.S. at 83, 105 S.Ct. at 1096. The Court found that the trial court was adequately "on notice" that "Ake's mental state at the time of the offense was a substantial factor in his defense," *id.* at 86, 105 S.Ct. at 1097, due in large part to the following facts: (1) Ake's sole defense was insanity; (2) the trial court, *sua sponte*, had ordered that Ake be examined by a psychiatrist to determine the cause of his "bizarre" behavior at arraignment; (3) a state psychiatrist later found Ake incompetent to stand trial; (4) Ake was deemed competent "only on the condition that he be sedated" with medication during the trial; and (5) psychiatrists who examined Ake for competency did so within six months of the offense, and opined that his "mental illness might have begun many years earlier." *Id.* at 86, 105 S.Ct. at 1098.

Because "[a] defendant's mental condition is not necessarily at issue in every criminal proceeding," *id.* at 82, 105 S.Ct. at 1096, the right to psychiatric assistance is not automatic. Rather, this right hinges upon the sufficiency of the defendant's preliminary showing to the trial court that there is a "substantial basis for the defense" that the expert will assist in presenting. *Moore v. Kemp*, 809 F.2d 702, 712

(11th Cir. 1987) (en banc). While defense counsel "cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide," he is nonetheless "obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert" to the defense. *Id.* The trial court must then examine the evidence before it, make all necessary inferences, and determine whether the provision of psychiatric assistance is warranted.

In reviewing an *Ake* claim like Hightower's, we look to

> the reasonableness of the trial judge's action at the time he took it. This assessment necessarily turns on the sufficiency of the petitioner's explanation as to why he needed an expert. That is, having heard petitioner's explanation, should the trial judge have concluded that unless he granted his request petitioner would likely be denied an adequate opportunity fairly to confront the State's case and to present his defense?

Id. at 710. The sources available to the trial court in considering Hightower's request for psychiatric assistance included (1) written motions and exhibits, (2) defense counsel's representations at pretrial proceedings, and (3) Hightower's behavior at pretrial proceedings. We "[place] ourselves in the shoes of the trial judge [and] analyze the information he received as it was brought before him." *Messer v. Kemp*, 831 F.2d 946, 961 (11th Cir. 1987) (en banc). In so doing, we conclude that Hightower failed to satisfy his preliminary burden under *Ake*, and was therefore not entitled to the services of a psychiatrist.

a.

Hightower's attorneys first notified the trial court of their desire for expert psychiatric assistance in a written motion dated August 6, 1987. The full text of the motion reads as follows:

> Motion for Funds to Hire Independent Psychiatrists
>
> 1. The defendant, John Hightower, was arrested on July 10, 1987, and charged with three counts of Murder.
>
> 2. The said Defendant was indicted by the Baldwin County Grand Jury on July 14 1987, for said offenses.
>
> 3. The District Attorney of Baldwin County, Georgia, Mr. Joseph Briley, has announced that he intends to seek the death penalty in the prosecution of said case.
>
> 4. Counsel for Defendant feel that the defendant's mental state, together with the presence or absence of any mental disorder or disease, may be of importance in the defense of said action.
>
> 5. Defense counsel were appointed by this Honorable Court to represent the Defendant, the said Defendant having been found previously indigent by this Court.
>
> 6. Defendant is without sufficient funds of any kind with which to hire independent psychiatric or psychological experts, and feels that the same would be needed in order to insure him all of his due process rights under

the Georgia and the United States Constitutions.

7. Defendant believes that independent psychiatric and/or psychological evaluations need to be accomplished in order to assure that any and all defenses can be properly presented at trial.

Wherefore, Defendant prays that funds be provided to his counsel of record for the purpose of employing independent psychiatric and/or psychological experts in the defense of his case.

This 6th day of August, 1987.

/s/ Hulane E. George, Attorney for Defendant
B. Carl Buice, Attorney for Defendant

The court heard arguments on this and other motions at a hearing on August 31, 1987. At the hearing, the court asked defense counsel whether they intended to "make a motion for an examination at Central State Hospital." They answered in the negative, and asked that the court consider instead their motion for funds to hire an independent psychiatrist. The court, pursuant to Ake, ordered counsel to make a preliminary showing that Hightower's sanity at the time of the offense was likely to be a significant factor at trial. Carl Buice, one of Hightower's two attorneys,[8] offered the following:

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[8] The court initially appointed Alan Thrower to represent Hightower. On July 17, 1987, 5 days after the murder, the court granted Thrower's motion to be relieved as counsel due to a conflict of interest. Four days after granting the motion, the court appointed Hulane E. George and B.

May it please the Court. Where we are at this point in this issue is at a very preliminary threshold because if we were not there we would get into a very circuitous situation. Obviously in order to determine clearly what we are going to need in the way of psychiatric testimony we need the help of a psychiatrist. It is not possible to evaluate fully the mental condition of the defendant without professional assistance to assist us in doing that and if the Court would note, the *Ake* decision does not just have to do with the defense of insanity, but goes on to talk about whether the mental condition of the defendant is going to be a factor at the trial of the case which has to do not only with the guilt/innocence phase or any plea of not guilty or of guilty but insane or not guilty for reasons of insanity, but also in the area of litigation and extenuation in terms of whether there are any characteristics of the defendant which would be mitigating of the circumstances in the event that he was convicted. Now, the only thing we can present to the Court at this point in the absence of having expert testimony is that which is already apparent in the record. That is, that we have here a man who is charged with three murders, the murder of his wife and two stepdaughters. This comes in a situation in a life history in which there has been no previous violence. We have a situation where a person of no demonstrated erratic behavior performs an act which is in

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Carl Buice to represent Hightower. George and Buice were a married couple who were also law partners. They served as Hightower's counsel both at trial and on direct appeal.

and of itself according to the charge of the district attorney, stunningly abhorrent. The event itself, the facts themselves raise the question of the mental state of the defendant and the circumstances which would lead up to such an event, not just in terms of insanity which, of course, is a legal term and not a mental health term, but in terms of all the factors in the defendant's psyche which might relate to this event and be important in the defense of his case, not only in the defense in the guilt and innocence phase, but in any phase of the trial in extenuation and mitigation. So, what we are asking for at this point in regard to this particular thing is some preliminary funds for a psychiatric evaluation on the part of a psychiatrist who is a part of the defense team who has—to whom we have access and with whom we can consult in the building of our defense of this man so that we can know what further issue we may need to raise in terms of psychiatric evaluation, what defenses we need to file in terms of this man's condition, whether we have defenses which are defenses in the guilt/innocence phase or are just issues in the extenuation or sentencing phase. All of these are matters that we cannot determine without having the benefit of counsel from a competent psychiatrist, someone trained in the mental health field who can help us know what to look for in terms of this man's personality. This is no small issue in a case of this nature. The mental state of the defendant is going to be a key factor all the way through and if we are to provide him with an adequate defense, if we are to be able to raise the issues which need to

> be raised in this case or at least consider the issues which may need to be raised, we need that expert assistance ab initio from the very beginning. To make us—to require us to make a showing in terms of some professional evidence in the case where we have no authority to get a professional to develop the evidence and have no resource to a professional to determine what sort of issues may be available to us, denies us of access to that whole area of defense from the very beginning.

In response to this statement, the court asked Buice how much money they needed for a psychiatric expert. He said they needed $750 "[o]n a preliminary basis, reserving the right to ask for an additional amount in terms of what we may find as we go forward." The court granted the motion and "authorize[d] [counsel] to expend up to" $750. The court also left open the possibility of granting more funds in the future, but only after another hearing.

At this point, the prosecutor moved that Hightower be admitted to Central State Hospital for a "psychological evaluation," so that the State could rebut any "claim as to mental incompetency" that the defense might raise at either phase of the trial. Defense counsel opposed the motion, stating that they would have Hightower evaluated by his own psychiatrist. The court asked when counsel intended to have Hightower examined by their psychiatrist. They said they planned to have him examined that very week. Buice, presumably referring to a psychiatric expert he had already contacted, added: "He has already done some preliminary interviews. He is in the process."

In response to the prosecutor's protests that the defense was merely seeking to "sandbag" the State by

preventing it the opportunity to examine Hightower, the court purported to grant the prosecutor's motion. But given defense counsel's representation that Hightower would soon be evaluated by his own expert, the court delayed his transportation to Central State Hospital for two weeks.

We now place ourselves in the position of the trial court and evaluate the evidence as it was submitted. In doing so, we make several observations. First, defense counsel made no issue of Hightower's "present sanity," i.e., his competency to stand trial.[9] They opposed the prosecutor's attempt to have Hightower evaluated by a state psychiatrist, and from the record, it does not appear that the State ever had him evaluated. Second, by the time of the hearing, his lawyers had engaged the services of an unnamed mental health expert, and this expert had already done some unspecified "preliminary" work on the case. Third, presumably because they had already chosen their own expert, counsel requested only that the trial court grant them *funds*. They never raised the option of an *appointed* psychiatrist. Fourth, unlike in *Ake*, in which the trial court was so concerned about the defendant's peculiar behavior that he ordered a psychiatric examination *sua sponte*, neither the court, the prosecutor, nor defense counsel ever made an issue of Hightower's behavior at the hearing.[10] Fifth, defense counsel failed to offer any fact bearing upon Hightower's mental status apart from the mere occurrence of the crime itself. At the hearing, they merely pointed out that Hightower was accused of three "abhorrent" murders even

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[9] Nothing in the record indicates that Hightower's behavior at this hearing was in any way peculiar. Indeed, Hightower's competency to stand trial does not appear ever to have been at issue, a point that Hightower himself makes in his brief.

[10] Nor has Hightower argued to us on appeal that his behavior should have given the trial court pause.

though his behavior had never before been violent or "erratic."

Based upon these observations, we conclude that Hightower had at this stage failed to satisfy his preliminary burden under *Ake*. The trial court had no evidence upon which to conclude that his "sanity at the time of the offense [was] to be a significant factor at trial." *Ake*, 470 U.S. at 83, 105 S.Ct. at 1096. Despite this, the court gave his attorneys precisely the sum they requested for a psychiatric expert. No constitutional error had yet occurred.

b.

As far as the record discloses, it was not until some three months later that the trial court dealt in any way with defense counsel's requests for expert psychiatric assistance. In an order dated November 25, 1987, the court, citing its authorization of $750 for the payment of a psychiatric expert, ordered the county to pay $440 to Dr. N. Archer Moore. Attached to the order is an itemized billing record detailing services Dr. Moore rendered in Hightower's case, which were as follows: (1) a one-hour interview with Hightower on August 25, 1987; (2) a two-hour interview with Hightower on August 28, 1987; (3) a two-hour interview with Hightower on August 31, 1987; (4) a one-hour interview with Hightower on November 16, 1987; and (5) a two-hour conference with Hightower's attorneys on November 17, 1987.

At this point, the court could discern the following. First, defense counsel had taken a portion of the funds they had received and used it to employ an expert of their choice, Dr. Moore. Second, Dr. Moore was a psychologist, not a

psychiatrist.[11] Third, Dr. Moore had taken the opportunity to evaluate Hightower on four separate occasions for a total of six hours. Fourth, defense counsel had not yet exhausted the $750 that they had received for the specific purpose of hiring a psychiatric expert.

No additional funds were requested at this stage, and no error had yet occurred.

c.

Another three months passed before defense counsel presented the trial court with any additional information regarding a need for expert psychiatric assistance. On February 8, 1988, they filed a motion, which reads as follows:

> Motion for Additional Funds to Hire Psychiatrist
>
> 1. On August 31, 1987, this Court granted the Defendant the sum of Seven Hundred Fifty ($750.00) [sic] to hire a psychologist and/or psychiatrist to evaluate the Defendant herein.
>
> 2. Defendant's counsels retained Dr. Archer Moore, of Macon, Georgia, to evaluate the Defendant. On the advise [sic] of Dr. Moore, Defendant's counsels were advised to seek a psychologist or psychiatrist who had extensive

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[11] The November 25 order does not identify this fact, though Dr. Moore's attached billing statement (1) recited his professional name as "N. Archer Moore, Ph.D.," (2) gave no indication that Dr. Moore possessed a medical degree in addition to his Ph.D., and (3) listed a single professional affiliation, the American Board of Psychology. The court from these facts alone could have assumed that Dr. Moore was a psychologist.

experience in dealing with family violence to evaluate the Defendant.

3. Dr. Emanuel Tanay, M.D., has been contacted by Defendant's counsel and has advised us that he would be able to provide forensic psychiatric services to Defendant. A copy of a letter from Dr. Tanay and a copy of his vitae is attached hereto as Exhibit "A" and is made a part hereof by reference.

4. Defendant requires the services of Dr. Tanay, if he is to adequately present not only his defense but to assist Defense counsel in the preparation of Defendant's case in the guilt/innocence phase as well as in the sentencing phase. To deny these services is to violate Defendant's constitutional rights under the Constitutions of the United States and the State of Georgia.

WHEREFORE, Defendant herein moves that this Court order that Dr. Tanay [sic] services be ordered and that this Court sign an order providing that his services would be reimbursed up to Six Thousand ($6,000.00) Dollars.

This 8th Day of February, 1988.

/s/ Hulane E. George

B. Carl Buice

The first attachment to the motion was a letter to defense counsel from Dr. Emanuel Tanay, M.D., dated February 1, 1988. In this letter, Dr. Tanay, writing in response to an "extensive telephone conference" with

defense counsel, expressed his willingness "to provide forensic psychiatric services" for Hightower at a reduced rate of $150.00 per hour plus expenses. Dr. Tanay estimated that his evaluation of Hightower would take at least twenty hours, and said that he required a court order to guarantee that he would be paid on an hourly basis for his testimony. In closing, Dr. Tanay stated that he could not evaluate Hightower before April 11, 1988.[12]

The second attachment to the motion was Dr. Tanay's curriculum vitae. It showed, among other things, that Dr. Tanay was a psychiatrist licensed in Michigan, Ohio, and Georgia, and that he was certified by the American Board of Psychiatry and Neurology and by the American Board of Forensic Psychiatry. In addition, the curriculum vitae listed Dr. Tanay's numerous publications, some of which appeared by their titles to address legal issues related to insanity, mental illness, forensic psychiatry, and psychic trauma.

The trial court held a hearing on defense counsel's motion on February 9, 1988. At the hearing, counsel informed the court of the following:

> We have had Mr. Hightower evaluated by our psychiatrist, Dr. Archer Moore, and he advised us that we really needed someone who was an expert in family violence. And we have combed the United States, and we have been advised that this man—if you will look at his eight page vitae which is just a part of his vitae, you can see he is very well qualified. I spoke to Dr. Tanay and as he said in his letter, he could not evaluate Mr.

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[12] Although it does not appear that a trial date had yet been set, the court and the parties seemed at that point to have contemplated a trial in mid- to late-April 1988.

> Hightower until April the 11th of 1988, and he states that he will reduce his regular fee to $150 per hour plus expenses. His expenses includes [sic] coming from Detroit to Atlanta and renting a car. I figure probably somewhere around $6,000 for total expenses for Dr. Tanay. We desperately need his input in this case. We need it not only in the guilt-innocent phase but we need it in the sentencing phase. We need someone to evaluate Mr. Hightower and to give us some clues as to the causes of this tragedy. And he seems—according to everyone that we can talk to—is just about the only one in the United States that is available.

The prosecutor responded that the court had "bent over backwards already" in meeting Hightower's requests for psychiatric assistance, and had "gone further than *Ake*" required in this regard. Defense counsel answered:

> We are not asking or dealing with the issue of minimum requirement of the appellate courts. We're asking for substantial justice on the part of Mr. Hightower. To use just an ordinary psychologist in a case of this sort where the issues of domestic violence, a very specialized field, are at stake is rather analagous [sic] to using a general practitioner for brain surgery. If any accused person in Mr. Hightower's situation, who had the funds to do so, were in his place, certainly a specialist of this sort would be used. The only reason for not using a specialist of this sort in this sort of case would be a lack of funds. And if Mr. Hightower is therefore refused—denied the access to this sort of specialist simply because

> of lack of funds, we submit that it would be tantamount to a failure of due process.

The court then asked counsel if they could cite any authority that required the provision of additional funds. They could not. Instead, they reminded the court that they had received $750 at the last hearing, and that, as they understood it, they were entitled to come to the court again "if [they] needed more." The court then asked counsel how much money it had given them "to spend at [their] discretion." Counsel answered:

> We have $5,000—$5,750. And we've divided that into Dr. Moore's bill which was I think $450 which has been paid. We had —we have hired a jury specialist and we have hired a special investigator and that will wipe out all of that money.

Without further argument, the court denied the motion for additional funds.[13]

We pause once again to consider whether the court committed error at this stage. We evaluate the additional evidence now available to the court and discern how it should have affected its actions. Several things are worth noting.

First, the court knew nothing of Dr. Moore's evaluation of Hightower save the dates and durations of the interviews. It was unclear at this point as to (1) whether Dr. Moore had been able to diagnose Hightower, (2) why Dr. Moore had "advised" defense counsel to seek an expert in "family violence," and (3) whether and in what phase defense counsel intended that Dr. Moore testify at trial.

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[13] Again, we note that the record bears no indication that Hightower's behavior at this hearing was in any way peculiar.

Second, the court knew nothing about the probable value of Dr. Tanay's assistance. It knew only that (1) Dr. Tanay, unlike Dr. Moore, was a psychiatrist, and (2) defense counsel perceived Dr. Tanay to be an expert in the unexplained field of "family violence." Defense counsel made no issue of the former distinction,[14] but instead grasped upon the latter distinction without explaining its significance. The most the court could glean from counsel's representations was that "family violence" was a "specialty" of psychology or psychiatry dealing with violent behavior in the context of family relationships. While a specialist of this kind might have been useful to Hightower, his attorneys essentially conceded at the hearing that their own notions of "justice," rather than the requirements of law, demanded the provision of such an expert.

Third, defense counsel provided no additional facts upon which to make an issue of Hightower's mental state. Indeed, although Dr. Moore had evaluated Hightower months beforehand, counsel still did not indicate that they would offer an insanity defense at trial.

Fourth, Hightower had not behaved peculiarly at any proceeding.

Based upon these observations, we conclude that Hightower still had not satisfied his preliminary burden under *Ake*. Months after they made their initial request for funds for a psychiatric expert, defense counsel still had not shown the court that Hightower's sanity was likely to be an issue at trial. That they had received expert funds in spite of

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[14] Because we hold that Hightower had no right to an expert under *Ake*, we need not decide the question of whether a criminal defendant's *Ake* rights are satisfied by the provision of a psychologist rather than a psychiatrist.

this deficiency did not entitle them to more. No error had yet occurred.

d.

The issue next arose in the context of Hightower's motion for a continuance, filed March 2, 1988. This motion contained no additional requests for funds for psychiatric assistance. Instead, in support of the request for a continuance, the motion offered the following information:

> Defendant has requested Dr. Emanuel Tanay to evaluate him as regards his defense and in the sentencing phase of this trial. Dr. Tanay has indicated to this Court that the first time he would evaluate Defendant would be on the week of April 18, 1988. Dr. Tanay would need time then to prepare his evaluation and discuss same with the defense counsel. There would not be enough time to accomplish this prior to the scheduled trial date. Dr. Tanay's testimony will be vital to Defendant's case in chief and to the sentencing phase.

On March 9, 1988, the court heard arguments on Hightower's motion. At the hearing, defense counsel told the court that they had sought Dr. Tanay's help, but that Hightower's family was "unable to come up with the money" to pay him. Counsel represented that Dr. Tanay "[had] to have at least $7,000 in his hand" and that he "[had] to have it, you know, like yesterday."[15] Counsel did not at this point

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[15] In the February 8, 1988, Motion for Additional Funds to Hire Psychiatrist, as well as at the hearing on the same motion, defense counsel had requested $6,000.00. It is unclear from the record as to why counsel at the March 9, 1988, hearing increased to $7,000.00 their estimate of the costs of Dr. Tanay's services.

request additional funds. Rather, they offered this information in support of their request for a continuance.

In opposing the motion for a continuance, the prosecutor argued that (1) the court had already given defense counsel a "lump sum of money . . . a blanket amount that could be used for anything they wanted to use it for," including expert psychiatric assistance; (2) defense counsel had not made any showing to the trial court that Hightower was "psychiatrically deprived"; and (3) as a result, defense counsel must have wanted a psychiatric expert for mitigation purposes. In any case, the prosecutor argued, defense counsel had already received "ample time" in which to secure the services of a psychiatrist.

The court denied the motion for a continuance, but said it would reconsider it if circumstances later made it appear that the trial could not proceed as scheduled.

We distill the record to its essence to determine what additional evidence the court received at this stage regarding Hightower's need for a psychiatric expert. First, counsel still tentatively planned to retain Dr. Tanay, though they were uncertain as to how they would pay him. Second, they offered no additional facts bearing upon the issue of Hightower's mental state. Third, Hightower's behavior at the pretrial proceedings remained normal. Fourth, except in contending that Dr. Tanay's testimony would be "vital" to both the guilt and sentencing phases of trial,[16] counsel had said nothing about a possible insanity defense.

Defense counsel did not at this stage request any additional funds for a psychiatric expert, and the trial court had not erred.

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16 The court could have looked upon this contention dubiously, as Dr. Tanay had not yet evaluated Hightower.

e.

On April 15, 1988, the court held a hearing on various matters. In support of a renewed motion for a continuance, defense counsel told the court that they had "secured a psychologist who [would] be working with [them] in the preparation of [the] defense," and that this psychologist's involvement in a murder trial elsewhere in the state might cause him to miss Hightower's trial. The court denied the motion nevertheless.

Defense counsel then made a lengthy oral statement in support of their view that the court's rulings on their requests for funds for experts had rendered their assistance to Hightower ineffective as a matter of law. As for their requests for funds for psychiatric assistance, counsel stated that they had been unable to hire Dr. Tanay because of the court's denial of their February 2, 1988, motion for additional funds. In response, the prosecutor stated:

> But, Your Honor, there has been absolutely no indication on counsel's part that they intend to use insanity, a special plea of insanity, not guilty by reason of insanity or any of the other accepted defenses in this case which would even trigger the necessity of the Court appointing psychiatrists or rendering money to the defendants for a psychiatric review in this case. It is my understanding that what counsel is relying on in this case based on their statement is the mitigating circumstance testimony by a psychiatrist or a psychologist and counsel says that has been arranged.

At the end of the prosecutor's remarks, the court said that it would "adhere to all . . . former rulings" on the issues that defense counsel had raised. The parties then addressed

other pretrial matters. As far as the record discloses, Hightower's behavior at the hearing was unremarkable.

Once again, we evaluate the evidence put before the trial court. First, defense counsel had abandoned the idea of hiring Dr. Tanay, and had instead engaged the services of another psychologist in addition to Dr. Moore. Second, counsel offered no additional facts bearing upon Hightower's mental state. Although the case was now proceeding under the new indictment,[17] and in spite of the fact that trial was set to begin in only two weeks,[18] defense counsel still had said nothing about relying on an insanity defense. Third, because they had not expressed an intention to present an insanity defense, the court could infer that at least one of the two psychologists that counsel had engaged would testify during the sentencing phase. Fourth, nothing suggested that Hightower might be incompetent to stand trial.

The court had not yet received any indication that Hightower's sanity at the time of the offense would be an issue at trial, and had not erred.

f.

We have surveyed all pretrial proceedings at which Hightower presented the trial court with information bearing upon his need for a psychiatric expert. He has failed to identify any point in those proceedings at which the court,

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17 *See supra* note 1.

18 By letter of February 29, 1988, the court set the case for trial beginning April 28, 1988. Throughout the remainder of the pretrial stages, the court was unwilling to reconsider this trial date, even though Hightower's new indictment did not issue until March 18, 1988. In fact, trial proceedings began as scheduled on April 28, 1988, with voir dire of the jury venire. Hightower does not presently allege that the court erred in refusing to continue the trial.

given the evidence *then available*, acted contrary to the requirements of federal law.

We are not unconcerned about putting the proverbial cart before the horse in cases of this kind. Without question, defense counsel may be unable fully to understand and explain his client's mental state until an evaluation is performed. But *Ake* does not require defense counsel to guide the trial court through the depths of the defendant's psyche; all it requires is a minimum threshold showing that the defendant's sanity at the time of the offense is likely to matter at trial. No such showing was made in this case.

2.

Even if we assume that Hightower made the showing *Ake* requires, we hold that the trial court met its constitutional obligation under *Ake* by providing Hightower with defense funds that could have been spent on the services of a psychiatric expert.

In addition to the $750 it granted specifically for a psychiatric expert, the court gave Hightower a lump sum of $5,000 for defense expenses. In Hightower's view, it would have been improper under the circumstances for his lawyers to use any portion of this lump sum for a psychiatric expert. The Georgia Supreme Court decided to the contrary on direct appeal, finding instead that Hightower could have used this lump sum "for a special investigator or other such expert assistance as [he] might choose." *Hightower v. State*, 386 S.E.2d 509, 511 (11th Cir. 1989). This finding of fact is entitled to a presumption of correctness, one that Hightower can rebut only "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The thrust of Hightower's argument before us is that the court awarded the lump sum specifically in response to

counsel's requests for funds for nonpsychiatric experts, i.e., demographers, jury specialists, and special investigators. Hightower points to the following exchange that took place between defense counsel and the court at the pretrial hearing on August 31, 1987:

THE COURT: All right. How much money are you asking for insofar as the special investigator is concerned?

MS. [sic] BUICE: Your Honor, I think that what we would like to have would be a sum of $5,000 to be able to proportion this between an investigator as well as a jury specialist. I had contacted a jury specialist and they have not called me back at this point. I believe the last information I got their fee was somewhere around $2,500, $1,500 to $2,500.

THE COURT: Well, I am going to deny your motion for a jury selection specialist. I am going to deny your motion for a demographer. What else did you ask for?

MS. GEORGE: Special Investigator.

THE COURT: I am going to grant your motion for a special investigator and authorize you to expend up to $5,000. Now, I am not going to require you to—if you want to spend your $5,000, part of it on a jury selection specialist, that's up to you. I'm just not going to provide any further compensation beyond the $5,000 without an additional hearing.

According to Hightower, this dialog definitively establishes an understanding between his attorneys and the court that the $5,000 lump sum could be used for an investigator and a jury consultant, but not for any other purpose.[19] We disagree. Whatever one might conclude from reading this dialog *in isolation*, the record *taken as a whole* amply supports the supreme court's finding. First, at the hearings on February 9, 1988, March 9, 1988, and April 15, 1988, counsel referred to their defense funds as discretionary.[20] Second, Hulane George testified before the

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[19] Unfortunately, the parties have not cited, and we cannot find, any written embodiment of the court's order regarding the $5,000 lump sum.

[20] At the hearing on February 9, 1988, when defense counsel requested additional funds for a psychiatric expert, the court asked for a reminder of the sum it had already granted counsel "to spend at [their] discretion." They answered: "We have $5,000—$5,750. And we've divided that into Dr. Moore's bill which was I think $450 which has been paid. We had—we have hired a jury specialist and we have hired a special investigator and that will wipe out all of that money." At the March 9, 1988 hearing, counsel told the court that it had given them "$5,000 to spend any way [they] wanted to and $750 for a psychiatric evaluation." At the April 15,

Butts County Superior Court that she and Buice "could [have] allocate[d] [the $5,000] however [they] wanted."

Third, the record shows that counsel *actually used a portion of the $5,000 lump sum to pay for the services of a psychologist who testified on Hightower's behalf at trial.* Dr. Howard Albrecht, Ph.D., testified for the defense during the sentencing phase of the trial.[21] After the trial concluded, George prepared,[22] and the court signed, an order for payment of Dr. Albrecht's services, which we reproduce here:

ORDER FOR PAYMENT OF
PSYCHOLOGICAL EVALUATION

1988 hearing, counsel said that the court had given them "$5,000 for [a special investigator] and all other experts [they] wished to hire to assist [them]."

[21] Throughout the record, confusion abounds as to the correct spelling of Dr. Albrecht's name. The index of the trial transcript, which includes the names of all testifying witnesses, lists him as "Dr. Harold Allbright." According to the transcript of his direct testimony, on the other hand, he at trial stated his name as "Howard Edward Allbright." Finally, the "Order for Payment of Psychological Evaluation" of May 17, 1988, matches how his name is printed on his attached letterhead invoice: "Howard E. Albrecht." We find the letterhead and accompanying motion most likely to be accurate and adopt his name as it is spelled there.

Lest we be concerned that there were 2 different psychologists with strikingly similar names (an unlikely scenario that would nonetheless wreak havoc with our reasoning regarding the May 17, 1988 order), we note that Dr. Albrecht's letterhead invoice, as well as the transcript of his trial testimony, both reflect the same practice location (Decatur, Georgia) and Georgia license number (748).

[22] The bottom left corner of the motion actually bears the mark of defense counsel's law firm: "Waddell, Emerson, George & Buice, Attorneys at Law, P.O. Drawer 630, Milledgeville, Georgia, 31061."

> This Court having found the above-named Defendant indigent, and,
>
> HAVING ORDERED on August 31, 1987, the payment of Five Thousand ($5,000.00) Dollars for costs incurred in the defense of the above-styled case and the attached invoice in the amount of One Thousand ($1,000.00) Dollars being received from Dr. Howard Albrecht, Ph.D.;
>
> IT IS HEREBY ORDERED that the County Commissioners of Baldwin County, Georgia pay over to said Dr. Howard Albrecht the sum of One Thousand ($1000.00) Dollars on the behalf of John Hightower, indigent.
>
> This 17th Day of May, 1988.
>
> /s/ William A. Prior, Jr., Judge
>
> Baldwin County Superior Court
>
> This Order prepared by:
>
> Hulane E. George
>
> MILLEDGEVILLE, GEORGIA 31061

Attached to the order is Dr. Albrecht's "Invoice for Professional Services," addressed to defense counsel and dated May 18, 1988.[23] Without itemizing costs, the invoice merely recites a balance due of $1000 for "Forensic Psychological Consultation on the *John Hightower* case."

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[23] We cannot tell why the order predated by 1 day the invoice that it purported to pay.

Thus, defense counsel not only *understood* that they could use the $5,000 lump sum for a psychiatric expert—they actually *did* in the case of Dr. Albrecht, a psychologist who, like Dr. Moore, they had chosen themselves.[24]

The record is therefore replete with evidence showing that defense counsel could, and in fact did, pay for a psychiatric expert out of the $5000 lump sum the trial court granted for defense expenses.

Ake makes clear that no criminal defendant "has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." 470 U.S. at 83, 105 S.Ct. at 1096. To the extent that Hightower claims the trial court should have granted him funds sufficient to hire Dr. Tanay, therefore, he is mistaken. In giving Hightower $5,750 in discretionary defense funds, the court went further than *Ake* requires. There was no error.

B.

Hightower also claims that the trial court violated his due process rights under *Ake* by permitting the prosecutor to attend and participate in hearings on his requests for funds for psychiatric experts. In Hightower's view, *Ake* demands that such hearings be conducted *ex parte*. Because Hightower raised this claim unsuccessfully on direct appeal

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24 The Georgia Supreme Court in its opinion on direct appeal stated: "[T]he defendant retained the services of a psychologist who testified at trial. The court authorized an additional $1,000 to pay for the services of this psychologist." *Hightower v. State*, 386 S.E.2d 509, 511 (Ga. 1989). This statement mischaracterizes the record. In fact, 2 psychologists testified at trial: Dr. Moore (during the guilt phase) and Dr. Albrecht (during the penalty phase). Dr. Moore was paid $440 by order of November 25, 1987, out of the $750 the judge granted at the hearing on August 31, 1987. Dr. Albrecht, on the other hand, was paid $1,000 by order of May 17, 1988, out of the $5,000 lump sum.

to the Georgia Supreme Court, our review is once again limited by 28 U.S.C. § 2254(d).[25]

This issue first arose at the hearing on August 31, 1987, when defense counsel argued their August 6, 1987 "Motion for Funds to Hire Independent Psychiatrists." Citing *Ake*, they argued that they were entitled to present this motion "without either the presence or participation of the [prosecutor]." The court rejected this interpretation of *Ake* and permitted the prosecutor's presence at this and every subsequent hearing at which counsel requested funds for a psychiatric expert.[26]

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[25] Although the Georgia Supreme Court disposed of this claim without extended discussion, *Hightower v. State*, 386 S.E.2d 509, 511 (1989) ("The defendant has not shown any harm from the denial of an *ex parte* hearing on the funds issue."), we agree with the district court that this claim was "adjudicated on the merits in State court proceedings" so as to trigger the provisions of 28 U.S.C. § 2254(d).

Hightower also raised this claim before the state habeas court, but that court did not address it.

[26] Upon considering defense counsel's *Ake* arguments at this hearing, the judge stated: "Well, I don't think—I don't think the word '*ex parte*' necessarily means the district attorney can't physically be present. I think it just simply means he can't participate." Hightower claims that the court, in spite of this interpretation, permitted the prosecutor to "participate actively" at this and every hearing at which his attorneys requested funds for a psychiatric expert. While this may be true, we do not view the presence/participation distinction as controlling in this particular case. Hightower does not merely claim that the court misapplied the correct standard, i.e., that his rights would have been adequately protected had the prosecutor been permitted to attend these hearings without participating. Rather, the thrust of Hightower's argument to us is that the prosecutor's mere *presence* at these hearings prejudiced his right to prepare his defense in secret.

Although defense counsel raised their *ex parte* objection at the August 31, 1987 hearing, it does not appear from the record that they raised the objection at any later hearing. No court to date has addressed

In support of his claim, Hightower points to the following language in *Ake*: "When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." 470 U.S. at 82-83, 105 S.Ct. at 1096. Hightower has expended substantial effort in seeking to convince us that the Supreme Court, through this single sentence, incorporated the *ex parte* requirement into *Ake*'s central holding. This effort is misdirected. Since Hightower raised this claim on direct appeal, we focus upon how the Georgia Supreme Court disposed of it, rather than how we would dispose of it on first impression.

The supreme court held simply that Hightower "[had] not shown any harm from the denial of an *ex parte* hearing on the funds issue." *Hightower v. State*, 386 S.E.2d 509, 511 (Ga. 1989). Thus, the court, which cited no authority in support of its holding, did not in this case pass directly on the question of whether *Ake* requires *ex parte* hearings.[27]

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whether Hightower thereby waives for purposes of appeal any errors occurring at these later hearings. We reject his claim on the merits without deciding this issue.

[27] Interestingly, 1 month before rendering its judgment in Hightower's case, the supreme court held in *Brooks v. State*, 385 S.E.2d 81, 84 (Ga. 1989), that an indigent criminal defendant's requests for funds for expert assistance should be heard *ex parte*. But the court did not base its holding upon the language of *Ake*. On the contrary, it stated that "[t]he *Ake* holding does not clearly mandate that [such] hearing[s] be *ex parte*." *Id.* at 83. Hightower cries foul from the fact that the supreme court did not refer to *Brooks* when it addressed his *ex parte* claim. But *Brooks* is unhelpful to Hightower at this stage, as the plain language of that opinion states that *Ake* does not require *ex parte* hearings. Whatever the reason for the court's failure to apply *Brooks* to Hightower's case, we are unconcerned in a federal habeas proceeding with errors of state law. As we go on to discuss, the supreme court did not run afoul of federal law in disposing of Hightower's *ex parte* claim.

Instead, the court, in our understanding, held that even if Hightower had a right to be heard *ex parte*, he suffered no prejudice from the denial of this right. It is implicit in this reasoning that the right that Hightower claims, if it even exists, is subject to a harmless error analysis. Viewed in this light, his *ex parte* claim fails both in principle and in application.

First, Hightower has not shown that the supreme court committed legal error in implicitly holding that the denial of *ex parte* hearings can be harmless. We express no opinion as to whether this holding is correct.[28] Our review is instead limited to whether this holding was contrary to or an unreasonable application of the clearly established precedent of the Supreme Court of the United States. We hold that it was not. Hightower does not cite, and we cannot find, any clear Supreme Court precedent stating that the denial of *ex parte* hearings on requests for expert psychiatric assistance is beyond harmless error analysis.

Second, Hightower has not shown that the Georgia Supreme Court erred on the question of prejudice. He contends that, as a result of the trial judge's refusal to conduct *ex parte* hearings on his requests for expert psychiatric assistance, the prosecutor became privy to defense strategies and to potential weaknesses in the defense's case.[29] Specifically, he asserts that his attorneys

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[28] We recently decided in *Hicks v. Head*, 333 F.3d 1280, 1287 (11th Cir. 2003), that *Ake* errors are subject to harmless error analysis. Our opinion dealt with the trial court's denial of psychiatric assistance, rather than with its failure to conduct *ex parte* hearings on requests for such assistance. We need not decide whether our opinion in *Hicks* applies with equal force to the latter issue. Rather, we need only determine whether the Georgia Supreme Court failed to conform to clear United States Supreme Court precedent existing at the time of its decision.

[29] Hightower also notes that, because the trial judge failed to conduct *ex parte* hearings, the prosecutor gained the ability to contest his attorneys'

were forced to disclose that Dr. Moore had "declared himself unqualified" to offer a diagnosis, and were required to "provide an accounting" of the funds they had spent in his defense. The record betrays these assertions. Counsel never revealed that Dr. Moore was "unqualified"; they merely told the court at the February 9, 1988 hearing that Dr. Moore "advised [them] that [they] really needed someone who was an expert in family violence." This mirrors the representation they made in their motion of February 8, 1988, which they served upon the prosecutor.[30] Furthermore, the court never demanded at these hearings that the attorneys provide an "accounting" of the funds they had spent. Instead, in support of their requests for additional funds counsel merely volunteered that they had already earmarked their existing funds.**[sic]**[31] We cannot say that Hightower suffered prejudice as a result of this disclosure.

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requests for funds for a psychiatric expert. To the extent he contends that he was in this way prejudiced, we disagree. The trial judge is ultimately responsible for the decision of whether to award expert funds. The prosecutor's arguments only matter insofar as the court accepts them. We address in Part III.A the question of whether the judge erred in refusing to grant Hightower's requests for funds.

30 The relevant part of this motion, styled "Motion for Additional Funds to Hire Psychiatrist," reads as follows:

Defendant's counsels [sic] retained Dr. Archer Moore, of Macon, Georgia, to evaluate the Defendant. On the advise [sic] of Dr. Moore, Defendant's counsels were advised to seek a psychologist or psychiatrist who had extensive experience in dealing with family violence to evaluate the Defendant.

31 At the close of the February 9, 1988 hearing, the judge asked, "How much money did I give you to start to spend at your discretion?" Defense counsel answered:

We have $5000—$5750. And we've divided that into Dr. Moore's bill which was I think $450 which has been paid. We had—we have

To maintain absolute secrecy, Hightower's attorneys could have filed their *Ake* motions under seal and requested that they be reviewed *in camera*.[32] But as the matter stands before us, given our narrow scope of review under 28 U.S.C. § 2254(d), there is no basis upon which to upset the decision of the Georgia Supreme Court. We therefore proceed to a discussion of Hightower's remaining claims.

IV.

Hightower next claims that the prosecutor used his peremptory strikes during jury selection in a racially discriminatory manner, in contravention of *Batson v.*

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hired a jury specialist and we have hired a special investigator and that will wipe out all of that money.

Without further argument from either party, the court denied the motion for additional funds. Thus, the court at this hearing merely asked for a reminder of the total sum it had already granted to the defense, rather than an accounting of how the money had been spent. Defense counsel of their own accord stated that they had already committed all of their funds, but they did not itemize their commitments.

At the March 9, 1988 hearing, defense counsel, in presenting their motion for a continuance, told the court that they had spent $450 of the $750 it had granted them for a psychiatric expert. (In fact, counsel had spent $440, not $450.) This disclosure revealed nothing more than what was stated in the court's order of November 25, 1987, which authorized payment for Dr. Moore's services.

At the April 15, 1988 hearing, defense counsel, in their lengthy oral statement to the court, noted that they had received defense funds totaling $5,750. They did not discuss how they had spent that money. Although the clear implication was that they would certainly exhaust this sum, counsel had already said as much at the February 9 hearing. More important, counsel offered this statement at their own behest. The court made no request that they account for the funds they had spent.

[32] Hightower does not contend that his attorneys were ineffective for failing to do so.

Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The Georgia Supreme Court rejected each of his *Batson* claims on direct appeal. *Hightower v. State*, 386 S.E.2d 506, 512 (Ga. 1989). Thus, our review is again limited by 28 U.S.C. § 2254(d). We find this claim to be without merit.

A.

We begin our analysis of this claim by describing the process by which the jury was selected. Voir dire was conducted on Thursday, April 28, and Friday, April 29, 1988. The court summoned a total of seventy-three venirepersons for Hightower's case, but had them appear in three groups: one on Thursday morning, one on Thursday afternoon, and one on Friday morning. The court began the voir dire process by first assembling each group in the courtroom en masse. After it made introductory remarks to the group, the court gave some preliminary instructions and administered oaths.[33] The court then delegated to the prosecutor the duty of propounding the "statutory voir dire" questions specified by Georgia law.[34] After ensuring that the entire group was

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[33] The oaths obligated the venirepersons to tell the truth under penalty of perjury to the questions put to them.

[34] O.C.G.A. § 15-12-164 requires that all venirepersons be asked 4 specific questions. These are: (1) "Have you, for any reason, formed or expressed any opinion in regard to the guilt or innocence of the accused?"; (2) "Have you any prejudice or bias resting on your mind either for or against the accused?"; (3) Is your mind perfectly impartial between the state and the accused?"; and (4) "Are you conscientiously opposed to capital punishment?". The prosecutor asked a form of these questions to each group en masse, rather than to each individual venireperson. Under Georgia law, the trial judge may give the prosecutor the duty of asking the statutory voir dire questions. *Hicks v. State*, 207 S.E.2d 30, 35-36 (Ga. 1974). It was altogether proper under Georgia law to ask these questions to each group of venirepersons en masse, rather than individually or in panels of twelve. *Ivester v. State*, 313 S.E.2d 674, 676 (Ga. 1984).

statutorily qualified, the court directed the clerk to call the venirepersons to the jury box twelve at a time for further questioning by the parties.[35] They were called in the same order as they were called when the clerk took the roll after they had reported for jury duty.[36]

Before the parties examined those in the jury box, the court asked them to state their names, addresses, workplaces, and their spouses' names and workplaces. The prosecutor and defense counsel then proceeded with their questioning. After counsel finished, the court permitted the parties to question individually and out of the presence of all other venirepersons anyone whose views on the death penalty appeared (to the parties) to be constitutionally problematic.[37]

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[35] O.C.G.A. § 15-12-131 provides that "it shall be the duty of the court, upon the request of either party, to place the jurors in the jury box in panels of 12 at a time, so as to facilitate their examination by counsel." This enables counsel to make an informed decision in exercising peremptory challenges and in obtaining grounds for a challenge for cause. O.C.G.A. § 15-12-133 provides that "[i]n all criminal cases[,] both the state and the defendant shall have the right to an individual examination of each juror from which the jury is to be selected prior to interposing a challenge."

[36] Since the venirepersons were called into the jury box in panels of 12, there always remained a group of venirepersons left over from the larger group assembled en masse. It appears that those left over remained in the courtroom and observed the parties' voir dire of the 12-person panels.

[37] Under Georgia law, "[t]he [trial] court has discretion in determining whether or not sequestered examination should be granted in a particular case." *Ivester*, 313 S.E.2d at 675. At a hearing held on the eve of trial, April 27, defense counsel presented evidence in support of a motion for individual and sequestered voir dire. The court denied this motion as to the venire as a whole, but said that it would permit individual and sequestered voir dire of those who (1) expressed views on the death penalty sufficient to raise a question as to their qualification for service on the petit jury, or (2) stated that they had previously heard about the case.

This process was repeated throughout the day on Thursday and through the early afternoon on Friday. In the end, the parties examined on voir dire six panels, five consisting of twelve persons, and one consisting of thirteen.[38]

The court entertained challenges for cause in two ways. The court heard challenges to those who were questioned individually and out of the presence of all other venirepersons immediately after each was examined. The prosecutor challenged four, and the court excused them. Defense counsel challenged one venireperson, to no avail. The court handled the remaining challenges for cause following the parties' examination of the respective twelve-person panels. The court did so in open court and in the presence of the entire venire, while the panel was in the jury box. Those excused promptly left the courtroom.

Fifty-nine venirepersons were qualified for service on the petit jury.[39] These qualified jurors assembled in the courtroom on Friday, April 29, at 4 P.M. The court informed them that the parties would choose the petit jury the following Monday, May 2, at 9 A.M. It asked them all to

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Before counsel conducted their individual, sequestered void **[sic]** dire of a panel member, the court cleared the courtroom of the rest of the venire, including those on the panel whom the parties expressed no desire to question individually and under sequestration.

[38] The court sat 13 venirepersons on the sixth panel to accommodate all venirepersons who remained at that point.

[39] O.C.G.A. § 15-12-160 provides that "in any case in which the state announces its intention to seek the death penalty, the court shall have impaneled 42 jurors from which the defense and state may strike jurors." Thus, more jurors were qualified in this case than Georgia law requires.

return to the courtroom at that time, prepared to serve on the petit jury for up to three days, if necessary.[40]

On Monday, May 2, the parties selected the petit jury from the fifty-nine qualified jurors. Defense counsel had twenty peremptory strikes, and the prosecutor ten.[41] The clerk called the names of the jurors individually, in the order in which they had been called (and ushered into the jury box in the panels of twelve) during voir dire. Each prospective juror was first placed upon the prosecutor, who either excused (by means of a peremptory strike) or accepted him. Jurors accepted by the prosecutor were placed upon defense counsel, and if accepted by them, were empaneled.[42] This process continued until the full petit jury of twelve was chosen.[43]

The parties then selected two alternate jurors.[44] As to these, defense counsel had four peremptory strikes, and the

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40 Once selected, the jury was sequestered for the duration of the trial.

41 O.C.G.A. § 15-12-165 provides that "in any case in which the state announces its intention to seek the death penalty, the person indicted for the crime may peremptorily challenge 20 jurors and the state shall be allowed one-half the number of peremptory challenges allowed to the accused."

42 O.C.G.A.§ 15-12-166 provides that "[i]f a juror is found competent and is not challenged peremptorily by the state, he shall be put upon the accused. Unless he is challenged peremptorily by the accused, the juror shall be sworn to try the case."

43 Of the 12 jurors who were empaneled, 9 were white and 3 were black.

44 O.C.G.A. § 15-12-168 permits a trial court to seat "one or more" alternate jurors in any felony trial that "is likely to be a protracted one."

prosecutor had two.[45] The clerk called the prospective alternate jurors from the same list as before, beginning with qualified juror number forty-three.

In the selection of the jury of twelve, the prosecutor used seven of his ten peremptory strikes, six against African-Americans. In the selection of the alternates, he used both of his strikes, one against an African-American. Immediately after each African-American was struck, defense counsel noted the juror's race for the record and informed the court that they wished to lodge a *Batson* objection. The court stated that it would consider counsel's objection after the parties had exercised their peremptory challenges and a jury of twelve and two alternates had been selected (but not sworn). When this was done, the court sent the jurors to the jury room, instructing them not to discuss the case, and directed the remaining qualified jurors to sit in the hallway outside of the courtroom.

Defense counsel then made their objections. Noting that Hightower was African-American, they contended that they had established a prima facie *Batson* violation because the prosecutor had purposefully struck members of Hightower's race on account of their race. In support of their claim that the prosecutor's conduct gave rise to an inference of racial discrimination, counsel advanced two lines of argument. First, they pointed out that in selecting the jury of twelve, the prosecutor used six of his seven strikes to exclude African-Americans. Second, they represented that the prosecutor had "in the past shown a bent and scheme to keep down the low number of blacks on either the grand jury or

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[45] O.C.G.A. § 15-12-169 provides that "[t]he state shall be entitled to as many peremptory challenges to alternate jurors as there are alternate jurors called," and that "[t]he defendant shall be entitled to additional peremptory challenges in an amount twice greater than the additional peremptory challenges of the state."

regular panels." Counsel presented a newspaper article about *State v. Amadeo*, a case which, they claimed, "arose out of a memo which has been attributed to Mr. Briley," the prosecutor, and which detailed "a purpose and a plan" to limit the number of African-Americans serving on grand juries.[46] Taken as a whole, counsel claimed, these facts were sufficient proof that the prosecutor had discriminated.

The prosecutor denied any attempt to "stack the jury" racially. The court nonetheless required him to give a reason for each of his strikes of African-Americans.[47] We recount his responses here.

Ricky Thomas. The prosecutor stated that Mr. Thomas's father had been convicted for killing Mr. Thomas's mother, but had later returned home to raise his children. The prosecutor feared that Mr. Thomas would "identify" the

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[46] Roughly 1 month after Hightower's trial, the Supreme Court handed down its decision in *Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). The Court held that the petitioner in that case had "established cause for his failure to raise in the state trial court a constitutional challenge to the composition" of his grand and petit juries. *Id.* at 216-17, 108 S.Ct. at 1774. Specifically, the Court noted that while the petitioner was pursuing a direct appeal in state court, an "independent civil action in federal court [had] brought to light a scheme" initiated by the Putnam County District Attorney to "underrepresent black people and women on the master jury lists." *Id.* at 217, 108 S.Ct. at 1774. The Court in its opinion did not provide the names of the individuals in the DA's office who were responsible for creating the memorandum that expressed this scheme. But some 3 years later, in *Horton v. Zant*, 941 F.2d 1449, 1455-56 (11th Cir. 1991), we noted that Hightower's prosecutor, Joseph Briley, had admitted to being the author of the memorandum.

[47] The court required the prosecutor to explain why he struck an African-American in selecting the 2 alternate jurors even though defense counsel, in articulating their *Batson* objections, said nothing about the prosecutor's exercise of that strike. In Hightower's brief to us, the prosecutor's striking of this proposed alternate juror does not appear to be part of Hightower's *Batson* claim.

instant case with his father's. Specifically, the prosecutor felt that Mr. Thomas would give undue thought to "what his father has meant to him since he [came] home," and would presumably be lenient with Hightower as a result.

Lucious Boswell. The prosecutor stated that Mr. Boswell (1) was the brother of the wife of Walter Davis, whom the State had prosecuted for cocaine trafficking and RICO violations, and (2) had indicated that a convicted murderer should "work [his punishment] out in prison," rather than suffer a death sentence.

Mattie Pearl Harris. The prosecutor stated that Ms. Harris (1) "expressed uncertainty" about her willingness to vote for a death sentence, (2) had a son who had been imprisoned frequently, (3) had a daughter who had served a drug-related prison sentence, and (4) had been forced to care for her daughter's children during the latter's prison sentence.

Norman Jonathan Mack. The prosecutor stated that Mr. Mack had "contradicted himself on the death penalty" during voir dire, once stating that he was "conscientiously opposed," and later softening that stance. The prosecutor felt he could not determine with sufficient certainty the scenarios in which Mr. Mack would be inclined to vote for a death sentence.

Thelma Butler. The prosecutor stated that Ms. Butler was the sister of the wife of Gerald Veasley, whom he had prosecuted to a conviction for aggravated battery.

Emerson Davis Jr. The prosecutor stated that Mr. Davis had appeared "somewhat [more] opposed to the death penalty" than other prospective jurors.

Lynette Davis (prospective alternate). The prosecutor stated that Ms. Davis (1) had an uncle whom the prosecutor's

office had recently convicted for burglary, and (2) was lukewarm on the death penalty.

After this, the court ruled. First, it declined to admit into evidence the newspaper article that defense counsel had submitted in support of their motion. Second, the court ruled that counsel had failed to make a prima facie case of discrimination, and alternatively, that the prosecutor had "presented an articulable, nonrace related reason for striking" each prospective black juror, thereby defeating the claim of discrimination.

B.

In *Batson*, the Supreme Court held that the State, in the person of the prosecutor, violates the Equal Protection Clause of the Fourteenth Amendment by striking jurors peremptorily on account of their race. 476 U.S. at 89, 106 S.Ct. at 1719. The Court established the mechanism for proving such violations. To make a prima facie case of discrimination,

> the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.
>
> Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the

> veniremen from the petit jury on account of their race.

Id. at 96, 106 S.Ct. at 1723 (citation and marks omitted). The trial judge "should consider all relevant circumstances" in deciding whether the defendant has made a prima facie case. *Id.* at 96-97, 106 S.Ct. at 1723.

After the defendant has made a prima facie case, the state must "come forward with a neutral explanation for challenging black jurors." *Id.* at 97, 106 S.Ct. at 1723. The Court has not stated with specificity what sort of explanation will suffice. While the prosecutor may not strike a juror simply on the assumption that "jurors of the defendant's race . . . would be partial to the defendant because of their shared race," he is not required to give an explanation that "rise[s] to the level justifying exercise of a challenge for cause." *Id.* Finally, the judge must decide whether the prosecutor purposefully discriminated against jurors on account of their race through the use of peremptory strikes. *Id.* at 98, 106 S.Ct. at 1724. The defendant carries the ultimate burden of persuasion on this issue. *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995).

With these principles as background, the Georgia Supreme Court on direct appeal rejected Hightower's *Batson* claim. "Even assuming [that Hightower] made out a prima facie case" of discrimination, the court held, the trial judge "was not clearly erroneous" in finding "that the prosecutor had articulated legitimate non-racial reasons for his challenges," and that the prosecutor had not in fact discriminated. *Hightower v. State*, 386 S.E.2d 509, 512 (Ga. 1989). Given our constraints under 28 U.S.C. § 2254, we find no basis upon which to disturb the supreme court's judgment.

We will assume for purposes of argument (as the supreme court did) that Hightower established a prima facie case of discrimination, thereby satisfying *Batson*'s first step.[48] We proceed to the second step of the *Batson* analysis to consider whether the prosecutor met his burden of production. The Supreme Court has held that *Batson*'s "second step . . . does not demand an explanation that is persuasive, or even plausible. At this second step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett*, 514 U.S. at 768, 115 S.Ct. at 1771 (citation, marks and brackets omitted). Based upon our review of the record, we cannot say that the Georgia courts erred in finding that the prosecutor satisfied this minimal burden of production. The prosecutor gave specific, nonracial reasons for each of his strikes of African-

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[48] We note that the courts that have decided this question have taken different approaches. The trial court, as we state in Part IV.A, held that Hightower failed to make a prima facie case, but that in any event, the prosecutor's race-neutral explanations for his strikes were sufficient to prevent Hightower from carrying his ultimate burden of persuasion. On direct appeal, the supreme court assumed without deciding that Hightower had made a prima facie case, but found no error in the trial judge's ultimate findings that the prosecutor (1) stated legitimate reasons for his strikes, and (2) had not discriminated. *Hightower v. State*, 386 S.E.2d 509, 512 (1989). The district court agreed with the trial judge that Hightower had failed to establish a prima facie case, and thus disposed of the claim without discussing the second or third steps of the *Batson* analysis. The district court's approach therefore differed from that taken by the supreme court.

Mindful of our role in habeas proceedings, we focus our analysis upon the correctness of the supreme court's judgment. That court assumed that Hightower had made out a prima facie case, but denied his claim nonetheless. Our task is to consider whether this judgment "was contrary to, or an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d).

Americans: some struck jurors were related to persons he had prosecuted or convicted, while others appeared to him to be uncomfortable with rendering a death sentence. Such explanations fall well within the boundaries set by *Batson* and its progeny. *Compare Purkett*, 514 U.S. at 769, 115 S.Ct. at 1771 (holding that the prosecutor satisfied his burden of production merely by expressing his discomfort with the struck black juror's long, unkempt hair, mustache, and beard), *with United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989) (holding that the prosecutor failed to satisfy his burden of production when he stated that he struck a black juror because he "just got a feeling about him").

Proceeding to the third and final step of the *Batson* analysis, we accept the finding of the Georgia courts that Hightower failed to "establish[] purposeful discrimination." *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724. Our judgment is informed in great part by our recognition of the trial court's superior position to observe the prosecutor's "credibility" and "demeanor," factors that bear strongly upon the ultimate question of whether the prosecutor discriminated. *Miller-El v. Cockrell*, 537 U.S. 322, 338-39, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003); *see Eagle v. Linahan*, 279 F.3d 926, 941 (11th Cir. 2001) ("[R]eviewing [a *Batson*] claim . . . require[s] us to look over the trial court's shoulder, reconstructing the circumstances surrounding the voir dire of the venire persons and the *Batson* hearing from the cold record, to decide whether the court correctly determined that the defendant had not raised an inference that the prosecution used its peremptory challenges to remove jurors on account of their race."). The *Batson* Court itself acknowledged that a trial court's findings on the question of discrimination "turn on evaluation of credibility," and require "great deference" on review. 476 U.S. at 98 n.21, 106 S.Ct. at 1724 n.21.

Hightower urges us to give minimal deference to the trial judge's findings. According to Hightower, (1) the

prosecutor failed to offer any evidence to support his bare assertions that he had prosecuted the relatives of the black jurors he struck; (2) the trial judge failed to demand that the prosecutor go back and question the black jurors he had struck to see if they could be impartial in spite of their relatives' criminal backgrounds; and (3) the prosecutor did not strike white jurors who were as lukewarm on the death penalty as the black jurors he struck. We dismiss the first two contentions out of hand. The prosecutor satisfied his burden of production merely by *stating* nonracial reasons for his strikes. As the Supreme Court has recognized, "[i]t is not until the *third* step that the *persuasiveness* of the [prosecutor's stated reasons] becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett*, 514 U.S. at 768, 115 S.Ct. at 1771 (second emphasis added). Hightower never provided the court with any evidence tending to discredit the persuasiveness of the prosecutor's stated reasons for striking black jurors. The judge was therefore free to accept the prosecutor's stated reasons at face value. Furthermore, he had no duty compel **[sic]** the prosecutor to verify by means of extended voir dire that the black jurors he struck would indeed have been partial to Hightower because of their relatives' criminal backgrounds. *Cf. Batson*, 476 U.S. at 97, 106 S.Ct. at 1723 ("[T]he prosecutor's explanation [for striking black jurors] need not rise to the level justifying exercise of a challenge for cause.").

Hightower's third contention is also fruitless. It is extraordinarily difficult upon the basis of the cold record to compare different jurors' predispositions toward the death penalty. Because such determinations turn largely on observable "credibility," *Wainwright v. Witt*, 469 U.S. 412, 429, 105 S.Ct. 844, 855, 83 L.Ed.2d 841 (1985), the trial court's judgment is entitled to great deference. *See id.* (holding that a finding of juror bias is a factual matter,

reviewed as such under 28 U.S.C. § 2254); *United States v. Alston*, 895 F.2d 1362, 1367 n.5 (11th Cir. 1990) ("It is of course true that comparing the attributes of the black and white venirepersons will aid the trier of fact and a reviewing court in determining whether the asserted reasons are pretextual or not. The attributes relied upon by the prosecutor in striking potential jurors are not always easily compared, however, and often require an evaluation of the degree to which the prospective juror manifests the stated attribute."). Given our narrow scope of review, we cannot say that the trial judge committed constitutional error in this regard.

In the end, the court was under a duty to weigh all evidence placed before it on the question of whether the prosecutor discriminated. Defense counsel rested their claim upon two main evidentiary bases. First, of the seven strikes the prosecutor used, six were against African-Americans. Second, although the Supreme Court had not yet issued its ruling in *Amadeo*, and we had not yet issued ours in *Horton*, controversy existed over the prosecutor's alleged role in a scheme to minimize the representation of minorities on local juries. On the other hand, militating against a finding of discrimination were the prosecutor's uncontested, specific, and race-neutral reasons for striking each black juror. It appears from the record that the court considered both sides of the question and found that the prosecutor had sufficiently rebutted Hightower's allegation of discrimination. Thus, the *Batson* mechanism, which is necessary **[sic]** deferential to trial court findings, operated properly in this case. *See Miller-El*, 537 U.S. at 339, 123 S.Ct. at 1040 ("[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.").

We are mindful of the harshness with which we criticized Briley in *Horton* for his past discriminatory practices. We recognize that these past practices are relevant

to his discriminatory intent in the case at hand. *See Horton*, 941 F.2d at 1455. But our task is to determine, in consideration of "*all* relevant circumstances," *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723 (emphasis added), and given our constraints under 28 U.S.C. § 2254, whether the state court judgment *in this case* runs afoul of federal law. We cannot say that it does.

V.

Hightower contends that the trial judge violated his federal constitutional right to an impartial jury by allowing jurors to serve who were impermissibly predisposed toward a death sentence. We find this claim to be procedurally defaulted.[49]

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[49] The district court also found procedural default. Our reasoning differs, however. In his present appeal, in the district court, and in the state habeas court, Hightower has framed this claim in essentially the same way. As we discuss in the text, he has argued that the trial judge used the wrong legal standard for excusing jurors for cause based upon their death penalty views—in other words, that the judge used the obsolete *Witherspoon* "automatic" standard, rather than the proper *Adams-Witt* "substantial impairment" standard. Hightower has furthermore contended that he was prejudiced by this recurring error, as it resulted in the seating of death-biased jurors Paul Jensen and Rufus Little.

The district court held that Hightower's claim, so stated, was materially different from the one he raised on direct appeal to the Georgia Supreme Court. According to the district court, Hightower claimed on direct appeal that the trial judge erred under *Witherspoon* by failing to excuse Jensen and Little. Put another way, Hightower claimed a *Witherspoon* error on direct appeal, but claimed at all subsequent proceedings that *Witherspoon* wasn't the proper standard to use in the first place. The district court essentially found that Hightower procedurally defaulted his present claim by failing to have framed it in the same way on direct appeal.

We part company with the district court's opinion in 2 respects. First, the district court was incorrect in stating that Hightower raised

In *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968), the Supreme Court held that a death sentence "cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[50] Later, in *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980), the Court refined this standard, holding that "a

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claims on direct appeal regarding Jensen and Little-in fact, as we go on to explain, he did not. Second, the district court paid undue attention to the misguided way in which Hightower has presented his claim. The crux of Hightower's claim must simply be *that jurors Jensen and Little were unconstitutionally permitted to serve*. As we discuss in the text, the relevant cases, *Witherspoon*, *Adams*, and *Witt*, merely provide the *standard* under which juror-specific *claims* of Hightower's type are examined.

[50] In *Witherspoon*, the petitioner claimed that the trial court unconstitutionally *excluded* jurors opposed to a death sentence. Hightower, on the other hand, claims that the trial court unconstitutionally *failed* to *exclude* jurors predisposed toward a death sentence. The test announced in *Adams* and *Witt* appears to emasculate any legal distinction between these 2 types of cases. *See* discussion *infra*; *Ross v. Oklahoma*, 487 U.S. 81, 85-86, 108 S.Ct. 2273, 2276-77, 101 L.Ed.2d 80 (1988) (accepting under the *Witt* framework the state's concession that the trial court should have *excused* a juror for cause because of his bias in favor of a death sentence, but holding that such error was harmless because the petitioner had eliminated this juror with a peremptory challenge). Nonetheless, claims of Hightower's type are still often described as "reverse-*Witherspoon*" claims, perhaps owing to language the Supreme Court has itself employed. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 731, 112 S.Ct. 2222, 2230-31, 119 L.Ed.2d 492 (1992) ("We have also come to recognize that the principles first propounded in *Witherspoon v. Illinois, the reverse of which are at issue here*, demand inquiry into whether the views of prospective jurors on the death penalty would disqualify them from sitting.") (emphasis added) (citation omitted)). Purely for conceptual purposes, we too use the terms "*Witherspoon*" and "reverse-*Witherspoon*" in referring to Hightower's claims.

juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." The Court's opinion in *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), made clear that the *Adams* "substantial impairment" test displaced *Witherspoon* as governing law.

Hightower now claims that two persons who served on his jury, Paul Jensen and Rufus Little, were unqualified to serve under the *Adams-Witt* standard. This claim differs materially from the one he raised on direct appeal to the Georgia Supreme Court. Before that court, Hightower in his brief enumerated the following relevant errors:

> 16. The trial court erred in refusing to excuse for cause juror Chilton, who stated unequivocally that if a person was convicted of killing three (3) people, a life sentence was not severe enough and "he ought to get the death penalty."
>
> 17. The trial court erred in refusing to excuse for cause juror Thompson who stated that a life sentence would not be adequate penalty if the accused was convicted of voluntary manslaughter.
>
> 18. The trial court erred in excusing for cause juror Ponder on the ground that she was opposed to the death penalty in that said juror testified that she would consider the death penalty.
>
> 19. The trial court erred in excusing for cause jurors Ponder, Stewart, and Bailey in that to

> automatically excuse all jurors opposed to the death penalty denied Defendant his constitutional right to be tried by a jury of his peers.
>
> 20. The trial court erred in refusing to excuse for cause juror Sheila Allgood who stated unequivocally that she would automatically vote for the death penalty if Defendant were convicted of three murders.
>
> 21. The trial court erred in refusing to excuse for cause juror Ruth Allgood on the ground that she was opposed to the death penalty in that said juror testified that she would consider the death penalty.

Thus, Hightower on direct appeal raised numerous *Witherspoon* and reverse-*Witherspoon* claims, but none as to jurors Jensen or Little, those whom he presently contends were unqualified to serve. The relevance of this omission is manifest. *Witherspoon* claims, dependent as they are upon individual predispositions, are juror-specific. Having failed to present claims on direct appeal as to Jensen and Little, Hightower procedurally defaulted such claims as a matter of state law.[51] *See Black v. Hardin*, 336 S.E.2d 754, 755 (Ga.

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[51] Before the state habeas court, Hightower presented the same *Witherspoon* claims (those regarding Jensen and Little) as he presents now. The state habeas court did not address these specific claims in its order denying Hightower's petition, however. Instead, that court addressed a distinct *Witherspoon*-type claim that is not before us—it held that Hightower procedurally defaulted his claim that the trial judge erred by permitting the prosecutor to question the members of the venire on their death penalty views.

In the brief supporting his application for a certificate of probable cause to appeal to the Georgia Supreme Court, Hightower claimed that the habeas court erred by failing to address his *Witherspoon* claims as to

1985) (holding that "a failure to make timely objection to any alleged error or deficiency or to pursue the same on appeal ordinarily will preclude review by writ of habeas corpus," absent a showing of cause and prejudice or "a miscarriage of justice where there has been a substantial denial of constitutional rights"). Because he has not shown cause for the default and prejudice resulting therefrom,[52] *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 249'7, 2506, 53 L.Ed.2d 594 (1977), or that a fundamental miscarriage of justice would otherwise result, *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), Hightower's *Witherspoon* claims fail.

VI

We turn finally to Hightower's claims of ineffective assistance of counsel.[53] Hightower contends that his attorneys committed various errors at both phases of his trial and on direct appeal.

The governing standard is that of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require

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Jensen and Little. The supreme court, evidently unmoved, summarily denied the application.

52 Although Hightower presents a *Witherspoon*-based claim of ineffective assistance of counsel, we reject it in Part VI.

53 We affirm without further discussion the district court's rejection of the following 2 claims of ineffective assistance: (1) that trial counsel failed fully to investigate Hightower's case, develop mitigating evidence, and seek correct jury instructions; (2) that trial counsel distanced themselves from Hightower in front of the jury.

> reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Counsel's performance is constitutionally "deficient" when it "[falls] below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2064. We must avoid all temptation to "second-guess" counsel's decisions as to trial strategy. *Id.* at 689, 104 S.Ct. at 2065. Instead, we are to examine "the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S.Ct. at 2066.

To establish prejudice, Hightower " must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. Put another way, he must establish that counsel's errors "undermine confidence in the outcome" of the case.[54] *Id.*

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54 The *Strickland* Court articulated different standards for challenges to convictions and sentences:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have

Ineffectiveness of counsel is a mixed question of law and fact. *Id.* at 698, 104 S.Ct. at 2070. Thus, we review these claims *de novo*. *Chandler v. United States*, 218 F.3d 1305, 1312 (11th Cir. 2000).

A.

Hightower first argues that his counsel failed to maintain a coherent defense theory.[55] We find no basis upon which to grant relief here.

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concluded that the balance of aggravating and mitigating circumstances did not warrant death.

466 U.S. at 695, 104 S.Ct. at 2068-69. Although Hightower claims that his attorneys were ineffective at both phases of his trial and on direct appeal, he does not clearly differentiate between errors that affected the guilt determinations and errors that affected the sentences. This differentiation is of no consequence, as we reject each of Hightower's claims of ineffective assistance as to both phases of his trial and as to his direct appeal.

[55] Relatedly, Hightower claims that trial counsel were ineffective for failing to present the testimony of a "competent" psychiatrist.

In Part III, we hold that Hightower was not entitled under *Ake* to the assistance of a psychiatrist, but that in the alternative, even if he was so entitled, trial counsel received funds they could have used for a psychiatric expert. Hightower's ineffective assistance claim depends upon the second alternative. He states the issue succinctly in a footnote in his brief: "If the funds provided by the state court *were* adequate, then trial counsel should have spent them to hire the qualified psychiatrist they knew was crucial to their defense." Essentially, Hightower challenges the way in which counsel spent the $5,750 in defense funds the court granted.

We conclude that Hightower has failed to establish *Strickland* deficiency in counsel's performance. Apart from blanket assertions that counsel should have spent some money on a psychiatrist, he gives no specific indication as to how they should have acted differently. He does not specify, for example, (1) how much counsel should have used for a "competent" psychiatrist; (2) whose services counsel should have declined to employ in order to retain a "competent" psychiatrist, e.g., the

Counsel testified at the hearing before the state habeas court that their strategy was to save Hightower's life, rather than to seek an acquittal. This was a reasonable strategic choice, given that Hightower confessed to the murders on the same day they occurred. Counsel only pursued this sentence-focused strategy after discussing it with Hightower and gaining his approval. Hightower has failed to articulate any concrete attorney error that prejudiced his defense.[56] This claim must therefore fail.

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investigator, the jury specialist, or Dr. Albrecht, all of whom were paid out of the provided funds; or (3) whether counsel should have hired a psychiatrist in addition to, or instead of, Drs. Moore and Albrecht, the psychologists who testified at trial. Because he has failed to demonstrate with specificity how counsel erred in spending the funds, Hightower essentially asks us, in direct contravention of *Strickland*, to apply the benefit of hindsight to scrutinize counsel's spending decisions. 466 U.S. at 689, 104 S.Ct. 2065. This we will not do.

[56] Hightower contends that his attorneys prejudicially altered their theory of defense during the course of the trial. He points to the fact that counsel accepted a "guilty, but mentally ill" instruction at the guilt phase charge conference after initially opposing such an instruction. But we cannot see how Hightower suffered prejudice in this regard. Reasonably believing that a "not guilty" verdict was unlikely, counsel evidently felt that it was to Hightower's benefit for the jury to have an alternative to straight "guilty" verdicts. That the jury did not select this alternative is immaterial to a claim of ineffective assistance of counsel.

We must clarify that this ineffective assistance claim is wholly separate from a claim that Hightower raised in the state habeas court and the district court. Before those courts, he claimed that the trial judge erred by failing to give to the jury the complete "guilty, but mentally ill" instruction required by O.C.G.A. § 17-7-131(b)(3)(B). Both courts found this claim procedurally defaulted. The question before us is merely whether trial counsel were ineffective in not objecting to a "guilty, but mentally ill" instruction *in the first instance*. We conclude that they were not. As to the next question, i.e., whether the trial judge erred in giving an improper "guilty, but mentally ill" instruction, Hightower has not presented the question to us, and we therefore do not address it.

B.

Hightower next claims that his attorneys were ineffective at trial for failing to challenge for cause or peremptorily strike two jurors who, in his view, appeared predisposed toward a death sentence.[57] He also contends that defense counsel were ineffective on direct appeal for failing to enumerate as error the court's seating of these jurors. The district court found that even though counsel may have been deficient, Hightower failed to establish prejudice resulting therefrom. We agree.

We first consider his claim as to juror Paul Jensen. The relevant portion of defense counsel's voir dire of Jensen, i.e., that which revealed his attitude toward a death sentence, reads as follows:

MR. BUICE:	Mr. Jensen? Where are you on that? Would the fact that three people died . . . ?
MR. JENSEN:	He's convicted of three murders?

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[57] Hightower also contends that counsel were ineffective at trial and on direct appeal because of their ignorance of the correct standard, i.e., *Adams-Witt* instead of *Wainwright*. *See* Part V. So stated, this claim misses the mark. Hightower cannot prevail on a claim of ineffective assistance without showing that he suffered prejudice. As to a reverse-*Witherspoon*-based claim of ineffective assistance, Hightower must show that counsel's ignorance of the correct standard resulted in the seating of jurors who were unconstitutionally biased in favor of death. Practically speaking, Hightower must show that because of their ignorance, defense counsel failed properly to deal with these unacceptable jurors, whether by neglecting to (1) challenge them for cause, (2) strike them peremptorily, or (3) claim on direct appeal that the trial judge erred by seating them. As with Hightower's main *Witherspoon* claims, we examine this ineffective assistance claim in a juror-specific manner.

MR. BUICE: Yes.

MR. JENSEN: It would be very—it would determine—it [sic] would have to determine the case—the case would have to determine how I'd feel exactly, but it would be very hard for me not to vote for the death penalty because of three murders.

MR. BUICE: Well, would the fact of three murders, then, tend to close your mind to other considerations?

MR. JENSEN: Right now it would, but it would have to be determined by the severity of the case and what was involved in determining of the three murders.

Counsel challenged Jensen for cause on the grounds that (1) he was a college student whose worry about missed coursework would divert his attention, and (2) he appeared to favor a death sentence if drugs or alcohol had contributed to the commission of the crime. The court rejected the challenge.

We conclude that this brief voir dire exchange provides no basis for relief.[58] Although Jensen suggested that he would favor a death sentence if three murders were

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[58] In support of his claim, Hightower offers no evidence beyond the excerpted portion of Jensen's responses that we reproduce here.

established, he also indicated that he could not form an opinion on the sentences until he heard the evidence. Given the difficulty of reviewing such equivocal answers from the cold record, years after they were uttered, it is obvious why we accord great deference to trial judge determinations of juror bias. *See, e.g., Wainwright v. Witt*, 469 U.S. 412, 429-30, 105 S.Ct. 844, 855, 83 L.Ed.2d 841 (1985) (holding that a trial court's determination of juror bias is a matter of fact, to be reviewed as such under 28 U.S.C. § 2254). The trial judge, in a superior position to observe Jensen's credibility and demeanor, refused to excuse Jensen for bias. We cannot say that Hightower suffered prejudice from counsel's failure to strike Jensen peremptorily or to allege on direct appeal that the court erred in seating him.

We next consider Hightower's claim as to juror Rufus Little. Defense counsel's voir dire of Little proceeded as follows:

> MS. GEORGE: . . . I am going to again ask the same question and I am going to say this with two questions. If a person has been convicted of murder and the murder of three people, are you strongly in favor, somewhat in favor, or somewhat opposed to the death penalty? . . . Okay, Mr. Little?
>
> MR. LITTLE: Strongly for it if it has been proven.
>
> MS. GEORGE: If it's been proven?
>
> MR. LITTLE: Yes.

. . .

MS. GEORGE: If there were a conviction of three deaths [sic], three people involved, three people had died, could you vote for a life imprisonment, would that be severe enough punishment for you? . . . How about you, Mr. Little?

MR. LITTLE: I would have to hear the case. Three murders, you know, that's cruel, but there may be something out of it to prove without a doubt, well then a life would—I'd have to hear the case.

. . .

MS. GEORGE: All right. How about you, Mr. Little? Would you automatically vote for the death penalty if there was a conviction of three people?

MR. LITTLE: If they proved without a doubt he did it.

MS. GEORGE: You would automatically do it?

MR. LITTLE: If they proved without any doubt, based on the circumstances, I would.

But it's hard to say until I hear the whole case.

MS. GEORGE: But you did say if the person was convicted beyond a reasonable doubt, you would automatically vote for the death penalty?

MR. LITTLE: Automatically—like I say I would automatically—like I say I would have to hear the case. Like I say I would automatically vote for the . . .

MS. GEORGE: That's all I have Your Honor.

Counsel did not (1) challenge Little for cause, (2) exercise a peremptory strike against him, or (3) claim on direct appeal that it was error to seat him. Again forced to review the cold record to detect bias,[59] we decline to grant relief. In our view, Little's statements during voir dire, in their totality, do not reflect a pro-death sentiment sufficient to establish prejudice. Even as defense counsel sought to pin down his bias, Little continually expressed that he would need to hear the whole case before deciding on the proper punishment. We agree with the district court that Hightower failed to show that Little's views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 424, 105 S.Ct. at 852.

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[59] Hightower produces no evidence as to Little beyond this excerpt of his examination.

VII.

We have considered Hightower's claims and find them to be without merit. The judgment of the district court is, accordingly,

AFFIRMED.

WILSON, Circuit Judge, concurring:

I agree with our ultimate conclusion that Hightower has not been successful in presenting a claim under *Batson*. In this case, we are obliged – and perhaps constrained – to defer to the state courts. This principle, coupled with the fact that the trial court did not have before it any real evidence of Briley's consistent pattern of discriminatory conduct,[1] supports our conclusion today.

However, I am quite concerned with the manner in which the state courts have applied *Batson* in this case. It appears that they have inappropriately condensed *Batson*'s

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1 Our opinion notes *supra* "the harshness with which we criticized Briley in [*Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991)] for his past discriminatory practices." *Supra* at 1035. Specifically, in *Horton*, we noted that Briley penned a memorandum (also mentioned in footnote 46, *supra*) that directed a clerk of court to limit the number of blacks, women, and young people on juries. *See Horton*, 941 F.2d at 1455. We also discussed in *Horton* a statistician's finding that in capital cases in eight Georgia counties involving black defendants over several years, Briley used 89.9% of his strikes against black venire members. *See id.* at 1458. In capital cases involving black defendants and white victims, that number jumped to 94.1%. *See id.* The case discussed a number of other similarly shocking statistical and mathematical findings. *See generally id.* at 1457-59. We found that under such odds, "courts cannot make a blind leap of faith that there exists some set of legitimate factors which correlates one-to-one with the race of the venire members." *See id.* at 1458.

three-part inquiry into two, thereby risking a serious constitutional error. I write separately to address my concerns, and to stress the importance of adherence to *Batson*'s requirements.

I first repeat the procedure that *Batson* mandates. First, the defendant must establish a prima facie case of discriminatory intent on the part of the prosecution. *See Batson*, 476 U.S. at 96. Once a court has determined that a defendant has established a prima facie case, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *See id.* at 97. If the state clears this hurdle, the trial court then has the responsibility to determine whether the defendant has established purposeful discrimination. *See id.* at 98; *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curiam). An analysis of the state courts' opinions in this case raises the question of whether they properly applied *Batson*'s third step.

The Georgia Supreme Court's discussion as to the *Batson* issue is so brief that it is unclear whether that court even reached and resolved *Batson*'s third step at all. The Georgia Supreme Court's entire discussion of Hightower's *Batson* claim is as follows:

> The defendant contends the prosecution was guilty of racial discrimination . . . . The prosecutor used only seven of his authorized 10 peremptory strikes. He used six of those seven strikes against black prospective jurors. The record shows that at least two black prospective jurors were struck by the defendant after having been accepted by the prosecutor. The prosecutor explained his peremptory challenges. Four of the challenged prospective jurors were closely related to persons convicted of serious

> felonies. The other two were conscientiously opposed to the death penalty, although not to the extent they were excused for cause. The trial court found that the prosecutor had articulated legitimate non-racial reasons for his challenges. Even assuming the defendant made out a prima facie case, . . . the trial court's determination is not clearly erroneous.

Hightower v. State, 386 S.E.2d 509, 512 (Ga. 1989) (citations omitted). The language in the final two sentences quoted above seems to suggest that once a prosecutor has articulated reasons for his challenges, a court's finding that those reasons are race-neutral is sufficient to end the *Batson* inquiry.[2] However, such a finding only triggers the third step in the analysis; we regard each step of *Batson*'s inquiry as a prerequisite to the next. *Cf. Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.*, 236 F.3d 629, 636 (11th Cir. 2000) ("As [*Batson*'s] framework makes clear, the establishment of a *prima facie* case is an absolute precondition to further inquiry into the motivation behind the challenged strike.").

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[2] This interpretation of the Georgia Supreme Court's opinion is buttressed by the fact that the trial court only made explicit determinations with regard to the first two steps. After hearing and approving each of the reasons for the prosecution's strikes, the court stated "I find that the defendants have failed to establish a prima facie case of discrimination on the part of the district attorney. I further find that as to each individual strike, the State has presented an articulable, nonrace related reason for striking the prospective juror." Tr. at 626. As I discuss *infra*, the trial court's threshold finding that Hightower failed to establish a prima facie case was questionable.

Further, it is unclear what the trial court's approach to *Batson* actually was. After improperly failing to find that a prima facie case had been established, the trial court proceeded to *Batson*'s second step – a step that it technically needn't have reached. Then, once it attempted to engage in *Batson*'s *full* inquiry, it failed by stopping short of *Batson*'s third step.

Once Hightower established a prima facie case of discrimination (or, once the Georgia Supreme Court *assumed* that Hightower established a prima facie case of discrimination), the burden shifted to the state to come forward with a neutral explanation for challenging black jurors. *See Bui v. Haley*, 321 F.3d 1304, 1313-14 (11th Cir. 2003). Once the state cleared that hurdle, the court then had the responsibility to determine whether Hightower had established purposeful discrimination. *Id.* at 1314. The Georgia Supreme Court appears to have been evaluating not whether Hightower had met his burden of establishing purposeful discrimination, but merely whether the prosecution's proffered reasons for the strikes were race-neutral. The approach taken could inappropriately turn *Batson* into a test of the sufficiency of the prosecution's reasons for its strikes. An entire additional step, in which the strength of Hightower's case was weighed against the persuasiveness of the state's proffered reasons for the strikes, appears to be missing from this case.

Moreover, the Georgia Supreme Court's conclusion is questionable in that it found as not clearly erroneous a trial court finding that plainly ran contrary to Supreme Court precedent. The trial court's primary error was in failing to find that Hightower had established a prima facie case of discrimination. The burden on a defendant seeking to establish a prima facie case is not high; he must merely show that "'he is a member of a cognizable racial group'" and that the 'relevant circumstances raise an inference' that [the prosecution] has 'exercised peremptory challenges to remove from the venire members of [his] race.'" *Fludd v. Dykes*, 863 F.2d 822, 829 (11th Cir. 1989) (quoting *Batson*, 476 U.S. at 96).

Obviously, Hightower demonstrated his being a member of a cognizable racial group, and his counsel's argument at trial, coupled with the long odds of six of seven

black jurors being struck from the jury, together were sufficient to raise at least an inference of improper conduct. It is difficult to determine what else the trial court could have required of Hightower for the presentation of his prima facie case. In short, the trial court raised the standard set by the Supreme Court. *See Holloway v. Horn*, 355 F.3d 707, 728 (3d Cir. 2004) ("The defendant generally meets [his] burden if there is a pattern of strikes or if the prosecutor's questions and statements during voir dire support an inference of discriminatory purpose.").

However, our obligation to defer is great, and while it appears that the Georgia Supreme Court could have engaged in a more thorough inquiry as to Hightower's *Batson* claim, it has not affirmatively misstated federal law. Our task at this stage is to review a state court's decision, and not its rationale. *See Wright v. Sec'y for the Dep't of Corrs.*, 278 F.3d 1245, 1255 (11th Cir. 2002). Although a state court opinion containing a "conspicuous misapplication of Supreme Court precedent" is not entitled to deference under the AEDPA, "[w]e will not presume that a state court misapplied federal law, and absent indication to the contrary will assume that state courts do understand 'clearly established Federal law . . . as determined by the Supreme Court of the United States.'" *Id.* at 1256 n.3 (quoting 28 U.S.C. § 2254(d)(1)). No such great deviation from federal precedent is present in this case.

Moreover, even if the Georgia Supreme Court *had* engaged in all three of *Batson*'s required steps, it is incredibly unlikely that the result in this case would have been any different. The burden of persuasion regarding purposeful discrimination never shifted from Hightower. The case he presented on this issue was not particularly strong and was met by ostensibly race-neutral reasons for the state's strikes. We now know quite well of Briley's shameful history of discriminatory conduct, and I question what a

better defense could have exposed in this case.[3] Still, after consideration of the record, I am constrained to join in today's decision.

A trial judge's stewardship over the jury selection process is not to be taken lightly. As Justice Powell wrote, "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85. With this in mind, I stress the singular importance of the trial court's role in *Batson*'s third step. By appearing to evaluate only the race-neutrality of the prosecution's reasons for its strikes and not clearly making a determination as to the entire record, a court runs the risk of virtually guaranteeing victory for the prosecution in every case. Trial judges must be vigilant to ensure that *Batson*'s test does not become a vehicle simply for approving the sufficiency of the prosecution's reasons for its strikes. The potential consequences of anything less are far too great.

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[3] I note, however, that Hightower's *Batson* claim was not presented in the context of his ineffective assistance of counsel claim.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

JOHN WASHINGTON HIGHTOWER, Plaintiff, v. TONY TURPIN, Warden, Jackson State Prison, Defendant.	Civil Action No. 3:96-CV-97(DF)

JUDGMENT

Pursuant to the Order of this Court dated and filed August 6, 1999, and for the reasons stated therein, Judgment is hereby entered in favor of Defendant.

This 9th day of August, 1999.

GREGORY J. LEONARD,
CLERK

By: /s/ Zadie Peters
Zadie Peters
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

JOHN WASHINGTON HIGHTOWER, Petitioner, v. TONY TURPIN, Warden, Jackson State Prison, Respondent.	3:96-CV-97(DF)

ORDER

Before the Court is Petitioner John Washington Hightower's federal habeas corpus petition pursuant to 28 U.S.C. § 2254. In 1988, Petitioner was convicted by a jury in Morgan County of three counts of murder and sentenced to death on all three counts.

Petitioner is an African-American male in his mid-fifties. In 1983, he married Dorothy Reaves, a divorced woman with two daughters, Evelyn and Sandra, from her previous marriage. He and Dorothy divorced only ten months after they were married but remarried four months later. In April 1987, they divorced a second time but continued to live together.

On Friday, July 10, 1987, Petitioner and Dorothy Hightower argued in the morning before John left for work. The argument ended with Dorothy telling Petitioner that it would be best if he moved out of the house. Petitioner agreed to move out that Sunday.

That afternoon after work, Petitioner stopped at a gun shop and examined a few guns, but he did not buy one. Petitioner asserts that he was deeply distressed and suicidal at the time. He returned on the morning of Saturday, July 11, 1987 and purchased a .25 caliber handgun and ammunition.

Petitioner maintains that he consumed substantial amounts of alcohol and cocaine throughout the day of July 11. He returned home with the gun that he had purchased and put it under the pillow on the bed he and Dorothy shared. At approximately 3:00 A.M. on Sunday, July 12, Petitioner took the gun from under the pillow and shot and killed Dorothy. He then entered the room of his stepdaughter, Sandra Reaves. She got out of bed but then lay back down, and Petitioner shot her in the head. His other stepdaughter, Evelyn Reaves, attempted to leave the house, but Petitioner caught up with her and shot her three times. He did not harm Kisha Reaves, his niece, who was staying at the house and sleeping next to Dorothy at the time.

Petitioner then got into Dorothy's car and drove around, contemplating suicide, according to Petitioner. The police found and arrested him in Eatonton, Georgia. A handgun, later determined to be the murder weapon, was found in Petitioner's car.

Petitioner was informed of his *Miranda* rights at the scene of his arrest. Several police officers involved in the arrest and questioning of Petitioner testified that Petitioner did not appear at the time to be intoxicated.

Petitioner was taken to the Putnam County Sheriff's Department, where he was again advised of his *Miranda* rights. His blood-stained clothes were taken to be analyzed. Petitioner indicated that he understood his rights, and he declined to make a statement.

Petitioner was returned to Baldwin County, where he was questioned on July 12, 1998. He was again notified of his *Miranda* rights and signed a waiver of counsel. A member of the Georgia Bureau of Investigation testified that at the time Petitioner did not appear to be under the influence of any intoxicants. Petitioner made two statements to police, confessing to shooting and killing all three victims.

As a result of extensive pretrial publicity, Petitioner's trial was transferred to Morgan County. The trial court originally appointed Alan Thrower to represent Petitioner, but Mr. Thrower immediately requested and received permission to withdraw. The court then appointed Carl Buice and Hulane George, husband and wife as well as law partners, to represent Petitioner. Ms. George had previously represented at least a hundred criminal defendants on felony as well as misdemeanor charges. *Transcript of State Habeas Hearing*, at 111-12. She had conducted approximately fifteen criminal trials, two of which involved murder charges. *Id.* at 130. And, this was not her first death penalty case. *Id.* at 163. Mr. Buice had previously worked on approximately six "significant" felony cases, but he had not previously worked on any murder trials. District Attorney Joseph Briley prosecuted Petitioner.

A jury found Petitioner guilty of three counts of malice murder and sentenced him to death by electrocution on each count. In sentencing Petitioner to death, the jury relied on the statutory aggravating circumstances that he

committed each killing while "engaged in the commission of another capital felony," that is, (1) the murder of Dorothy Hightower was committed while the defendant was engaged in the commission of the murder of Evelyn Reaves, (2) the murder of Sandra Reaves was committed while the defendant was engaged in the commission of the murder of Dorothy Hightower, and (2) the murder of Evelyn Reaves was committed while the defendant was engaged in the murder of Sandra Reaves.

Petitioner's conviction and sentence were affirmed on direct appeal to the Georgia Supreme Court in 1989. *See Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509 (1989).[1] Petitioner then sought a writ of habeas corpus from the Superior Court of Butts County, Georgia (hereinafter referred to as "state habeas petition" and "state habeas court"). After conducting a hearing in 1994, the state habeas court denied the petition.[2]

All of the claims made in the instant § 2254 petition were raised in the state habeas proceeding.

I. STANDARD OF REVIEW

As the Court discussed in its previous order of June 2, 1998, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) generally applies to Hightower's petition,

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[1] In 1990, the United States Supreme Court denied Petitioner's petition for Writ of Certiorari, *Hightower v. Georgia*, 498 U.S. 882 (1990), and Petitioner's Petition for Rehearing, *Hightower v. Georgia*, 498 U.S. 995 (1990).

[2] The Supreme Court of Georgia denied Petitioner's Certificate of Probable Cause to Appeal the denial of his habeas corpus petition and his Motion for Reconsideration in 1994. The United States Supreme Court denied Petitioner's petition for Writ of Certiorari and Petition for Rehearing in 1995.

because it was filed after the effective date of the Act. *See Neeley v. Nagle*, 138 F.3d 917, 921-22 (11th Cir. 1998). As amended by the AEDPA, 28 US.C. § 2254(d) establishes the standard of review to be applied by a federal court considering a state prisoner's habeas petition and provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In the Eleventh Circuit, a district court evaluating a habeas petition under § 2254(d)(1) must engage in a three step inquiry. First, the court must ascertain the Supreme Court case law that was clearly established at the time the state court made its decision. *Id.* at 923-24. Second, the court must determine if the state court's decision was contrary to this clearly established Supreme Court case law, "either because the state court failed to apply the proper Supreme Court precedent, or because [it] reached a different

conclusion on substantially similar facts." *Id.*[3] Finally, if the federal court finds that the state court's decision was not contrary to clearly established Supreme Court law, it must then determine whether the state court unreasonably applied the Supreme Court authority to the facts of the case at bar. *Id.*

Section 2254(d)(2) determines the standard of review applicable to claims based on pure questions of fact. When a petition for habeas relief is based on a challenge to a factual determination, before granting the habeas petition, the federal court must find that the state decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court. § 2254(d)(2). Additionally, factual determinations made by a state court must be presumed to be correct, and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. § 2254(e)(1).

In the June 1998 order, this Court found that certain claims were not adjudicated on the merits within the meaning of § 2254(d) because they were found to be procedurally barred by the state habeas court. This Court is precluded from reviewing claims that the state courts have not previously evaluated, unless Petitioner can demonstrate *both* "cause for the default and actual prejudice as a result of the alleged violation of federal law," or demonstrate that failure to consider the claims will result in a "fundamental miscarriage of justice." *Schulp v. Deto*, 513 U.S. 298, 314-15, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87-88, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

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[3] Not only must the clearly established federal law be determined by the Supreme Court, but it must be Supreme Court case law in effect when the state court decided the case. *Neeley*, 138 F.3d at 923 & n.3.

The cause prong of this test is satisfied by actual ineffective assistance of counsel or by some objective factor external to the defense that impeded counsel's efforts to comply with the state's procedural rule. *Murray*, 477 U.S. at 488, 106 S.Ct. at 2645. While the Supreme Court has not provided a precise definition of the "prejudice" prong of the cause-and-prejudice test, it has made clear that more than a mere possibility of prejudice is required; a petitioner must show that the error "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982). *See also Reed v. Ross*, 468 U.S. 1, 12 (1984) (actual prejudice shown where, but for the alleged error, the defendant "might not have been convicted of first degree murder"); *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991) ("A petitioner shows prejudice due to ineffective assistance of counsel when . . . there is a probability of a different result sufficient to undermine confidence in the outcome [of the case].").

If a petitioner cannot show both cause and prejudice sufficient to excuse a procedural default, his claims may still be reviewed if failure to consider them would result in a "fundamental miscarriage of justice." *Schulp*, 513 U.S. at 314-15. A fundamental miscarriage of justice at the guilt-innocence phase of trial has occurred when a constitutional violation has probably resulted in the conviction of someone who is actually innocent. *Id.* at 323; *Murray*, 477 U.S. at 496. To show that he is "innocent" of the death penalty, a petitioner "must show that 'but for constitutional error at his sentencing hearing, no reasonable juror could have found him eligible for the death penalty under [state] law.'" *Hill v. Jones*, 81 F.3d 1015, 1023 (11th Cir. 1996) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 2522-23, 120 L.Ed.2d 269 (1992)).

II. DISCUSSION

A. Claim I: Petitioner was refused access to a qualified psychiatrist, thereby denying him the ability to prepare and present a defense or to present mitigating psychiatric evidence during the penalty phase of his trial

1. The trial court refused to provide funds for a qualified psychiatric expert

Petitioner contends that the trial court's refusal to provide sufficient funds to enable Petitioner to retain an expert in family violence violated his constitutional rights. At trial, Petitioner made several requests for funds, which he asserted he needed in order to hire a qualified psychiatrist to evaluate him and aid in his defense. In support of these funding requests, defense counsel relied on the Supreme Court case of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), which requires that an indigent defendant be given access to a qualified psychiatrist when the defendant demonstrates that his sanity is a significant factor in his defense. *Id.* at 82-83.

During the August 31, 1987 hearing, defense counsel requested that the trial court grant $750 in order to hire someone to perform a psychological evaluation of Petitioner. The trial court granted the requested funds but stated that a further hearing would be held if the defense requested additional funds. The prosecutor then moved to have Petitioner admitted to Central State Hospital for a psychological examination, but defense counsel objected because they wanted to have Petitioner evaluated by his own psychiatrist.

Defense counsel used the $750 to hire a psychologist, Dr. Archer Moore, in order to conduct an initial evaluation.

Dr. Moore was a friend of Mr. Buice, but he had no background in forensic psychiatry. After evaluating Petitioner, Dr. Moore informed defense counsel that he lacked the substantive expertise necessary to evaluate Petitioner's actions. He advised defense counsel to seek a specialist in family violence, specifically someone with experience in interpreting sudden outbursts of violent behavior.

On February 9, 1988, during a hearing before the trial court, Ms. George informed the court that Dr. Moore had evaluated the defendant and advised counsel that they needed an expert in family violence. *Transcript of 2/9/88 Hearing*, at 2. Ms. George stated that after searching throughout the country, she found a qualified expert, Dr. Manuel Tanay, and that the defense needed him not only in the guilt-innocence phase of trial but also at sentencing to give defense counsel "some clues as to the causes of this tragedy." *Id.* at 3. She estimated that the total expenses for Dr. Tanay would be approximately $6,000. *Id.*

The trial court gave the prosecutor an opportunity to respond. He argued that the court had "already gone further than *Ake*" and that the court had "bent over backwards already in this particular area for this particular defendant." *Id.* at 3-4. The court asked Ms. George how much the defense had been given so far "to spend at [the defense's] discretion," to which Ms. George responded that they had received a total of $5,750–an initial $750 for an initial evaluation by Dr. Moore (of which they had already spent $450) and $5,000, which they used to hire a special investigator and a jury specialist. *Id.* at 5. The court then,

without explanation, declined to allocate any additional funds. *Id.* at 6.[4]

During a hearing on March 9, 1988, Ms. George renewed her request for additional funds with which to hire Dr. Tanay. She informed the court that Dr. Tanay would cost $7,000 and that Petitioner's family could not pay that amount. *Transcript of 3/9/88 Hearing*, at 1-2. The prosecutor responded that "there has been nothing to indicate that this defendant is psychologically deprived and that he is unable to stand trial at the time, so it must be going to mitigation." *Id.* at 3. The court asked defense counsel to clarify how much money had already been given, and Ms. George responded that the court had given the defense two sums: $5,000 to spend "any way [they] wanted" and $750 for a psychiatric evaluation. *Id.* at 4-5. The parties then went on to argue another matter and nothing further was said about additional funds to hire Dr. Tanay during that hearing.

During a hearing on April 15, 1988, defense counsel read a statement into the record, which essentially outlined several problems that defense counsel believed rendered them unable to provide effective assistance to the defendant. One of the issues mentioned in this statement was the trial court's refusal to grant the defense additional funds to hire Dr. Tanay. *Transcript of 4/15/88 Hearing*, at 6. After hearing this statement, the trial court allowed Mr. Briley, for the prosecution, to respond. Mr. Briley stated that "there has been absolutely no indication on defense counsel's part that they intend to use insanity, a special plea of insanity, not guilty by reason of insanity or any of the other accepted

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[4] A hearing was held on February 19, 1988, which the petitioner characterizes as "the third *Ake* hearing," but during this hearing Ms. George requested funds with which to conduct an investigation and to hire an expert who could assist defense counsel in conducting voir dire. The defense did not make a specific request for funds to hire a psychiatrist at this hearing.

defenses in this case which would even trigger the necessity of the court appointing psychiatrists or rendering money to the defense for a psychiatric review in this case." *Id.* at 9. Immediately after Mr. Briley finished his response, the trial judge stated that he was going to adhere to all of his former rulings on the matter. *Id.* at 10.

On direct appeal, the Georgia Supreme Court found that the trial court did not deny Petitioner any necessary financial assistance. *Hightower*, 386 S.E.2d at 511 (*citing Crawford v. State*, 257 Ga. 681, 362 S.E.2d 201 (1987)).[5] The Georgia Supreme Court found that the trial court authorized payment of $750 for a psychiatric evaluation and $5,000 for a special investigator "or other such expert assistance as the defendant might choose." *Hightower*, 386 S.E.2d at 511. The Georgia Supreme Court therefore concluded that "the trial court did not deny the defendant any necessary financial assistance." *Hightower*, 386 S.E.2d at 511.

The aforementioned AEDPA standard governs the Court's consideration of the instant claim, because the claim has been adjudicated on the merits in state court. Under that standard, Petitioner must show that the Georgia Supreme Court's decision regarding the trial court's denial of Petitioner's funding requests was contrary to or involved an unreasonable application of clearly established Supreme Court case law. *Id.* § 2254(d)(1). Petitioner argues in the instant petition that the trial court's refusal to provide additional funds with which to hire an expert in family violence violated his rights to due process, a fair trial, and the effective assistance of counsel. Petitioner asserts that because his mental state at the time of the

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[5] The state habeas court found that it was bound by the decision of the Georgia Supreme Court. *State Habeas Order*, at 65.

killings was the crux of his defense, his counsel needed an accurate evaluation by a qualified psychiatrist to assist them in his defense. Because the trial court refused to grant Petitioner's request for additional funds to retain such an expert, counsel had to rely on Dr. Moore, who was not qualified to render an effective evaluation of Petitioner.[6]

In *Ake*, the Supreme Court held that an indigent defendant who knows that his sanity at the time of the offense will be a significant factor at trial must have access to a competent psychiatrist, thus enabling him to present an effective defense. 470 U.S. at 83, 105 S.Ct. at 1097. The Court stated, however, that,

> **[t]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.** Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the state the decision on how to implement this right.

Id. (emphasis added). Before this right is triggered, the defendant must show "a reasonable probability both that an expert would be of assistance to the defense and that denial

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6 During cross examination by Mr. Briley, Dr. Moore had to admit that he could not accurately diagnose a personality disorder, could not differentiate Petitioner from other criminals, could not rule out "revenge" as a motivating factor for the killings, had no explanation for Petitioner's failure to commit suicide after the killings, had no opinion whether Petitioner was able to consider the legal consequences of his actions at the time of the killings, and could not explain why Petitioner responded with violence to "the stressful situation" on the morning of July 12, 1987.

of expert assistance would result in a fundamentally unfair trial." *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987).

The Court finds that the decision of the Supreme Court of Georgia was not contrary to or an unreasonable application of *Ake v. Oklahoma* or any other Supreme Court case. 28 U.S.C. § 2254(d). The trial court allocated $5,750 to the defense and did not limit expenditure of those funds but rather allowed counsel to spend the funds "any way [they] wanted." *Transcript of 3/9/88 Hearing*, at 4-5; *Transcript of Habeas Hearing*, Volume I, at 125-26. Even though *Ake* clearly states that a criminal defendant does not have a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own, 470 U.S. at 83, 105 S.Ct. at 1097, Petitioner was given some funds with which to hire a psychologist of his choice (Dr. Moore); moreover, Petitioner objected to being evaluated at Central State Hospital.

Petitioner has not shown that additional funds with which to hire a specialist was required under *Ake* or that the failure of the trial court to grant any additional funds denied Petitioner a fundamentally fair trial. *Moore*, 809 F.2d at 712. As such, Petitioner is not entitled to habeas relief on this ground.

2. The prosecution improperly attended every "ex parte" pretrial hearing concerning Petitioner's need for a qualified psychiatrist

Petitioner also asserts that his constitutional rights were violated when the prosecution improperly attended every pretrial hearing concerning Petitioner's need for a qualified psychiatrist and successfully opposed Petitioner's request for funds. Petitioner contends that *Ake* requires that hearings on

requests for psychiatric assistance be held *ex parte*. Petitioner asserts that his constitutional rights were violated when the trial court not only allowed the prosecution to be present during each of the five hearings held in Petitioner's case but also by allowing the prosecutor to actively oppose Petitioner's requests for additional funds to retain a qualified psychiatrist.[7] Petitioner relies on the following statement in *Ake* to support his assertion: "When the defendant is able to make out an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." *Ake*, 470 U.S. at 82-83; 105 S.Ct. at 1096.

Over the Petitioner's objections to the prosecution's attendance, the trial court ruled that "ex parte," as used in *Ake*, did not exclude the prosecutor's presence at the hearing, but rather, it simply excluded his participation. *Transcript of 8/31/87 Hearing*, at 15-16. On direct appeal, the Georgia Supreme Court held that, "[t]he defendant has not shown any harm from the denial of an ex parte hearing on the funds issue." *Hightower v. State*, 386 S.E.2d 509, 511 (Ga.

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7 Petitioner contends that the prosecutor's presence during these hearings had two detrimental effects on his defense. First, the prosecutor was able to urge the court to deny Petitioner's requests for additional funds to hire an expert in family violence. After hearing the prosecutor's arguments against granting Petitioner additional funds, the trial court denied Petitioner's request for funds each and every time. Second, the prosecutor gained knowledg of the defense strategies, as they were required to be presented to the court during the hearings, and the prosecutor used this knowledge against the defense. For example, the prosecutor learned that Dr. Moore did not have the necessary expertise to shed light on why Petitioner might have committed the killings, and, the prosecutor used this knowledge when he cross-examined Dr. Moore. *See* n.6, *supra*. Moreover, the defense was forced to reveal its "family violence" defense in front of the prosecutor as well as details about the manner in which the defense had spent its allocated funds.

1989).[8] Because there is a state court decision on the merits with respect to this particular claim, the new AEDPA standard discussed previously controls consideration of this claim.

In *Ake*, the Supreme Court did make a reference to an *ex parte* hearing, but the Court did not hold that such a hearing is constitutionally required. The Court held in *Ake* that, if a defendant makes an *ex parte* showing that the question of his sanity is likely to play a significant role in the trial, then he is entitled to the assistance of a competent psychiatrist. 470 U.S. at 82-83, 105 S.Ct. at 1095-96. *Ake* did not hold that a defendant has the right to an *ex parte* competency hearing. Therefore, the state court's decision was not contrary to nor involved an unreasonable application of clearly established Federal law. 28 U.S.C. § 2254(d)(1). Accordingly, Petitioner is not entitled to have his § 2254 petition granted on this ground.

B. Claim II: The trial court failed to strike for cause several jurors whose strongly stated views in favor of the death penalty substantially impaired their ability to consider a lesser sentence

Petitioner next argues that the trial court failed to strike for cause several prospective jurors, two of which ended up on Petitioner's jury, who stated strong views in favor of the death penalty, and that such failure violated Petitioner's Sixth and Fourteenth Amendment rights to an impartial jury.

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8 The state habeas corpus court did not address the Petitioner's claim that the trial court's failure to conduct his *Ake* hearing ex parte violated his constitutional rights.

In Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), the Supreme Court clarified its previous decision in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968),[9] by setting forth "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment." The Court held that the proper standard is whether the prospective juror's views "'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)). The Court further held that "in addition to dispensing with *Witherspoon*'s reference to 'automatic' decision making, this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.'" *Wainwright*, 469 U.S. at 424.

A federal court reviewing a defendant's habeas petition must give deference to the trial judge's determination of death-penalty bias, because the trial judge sees and hears the jurors and, "despite the lack of clarity in the printed record, . . . there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.*, at 425-26, 105 S.Ct. at 852-53. Furthermore, determining whether a prospective juror is biased depends upon credibility and demeanor, which are "peculiarly within a trial court's province." *Id.*, 469 U.S. at 428, 105 S.Ct. at 854. And, these determinations cannot be

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9 The *Witherspoon* Court concluded that potential jurors can be subject to challenge for cause based on their views only if it is unquestionably apparent that they would automatically vote against the death penalty or that their views would prevent them from making an unbiased determination on the question of guilt.

easily discerned from the written record. *Id.*, 469 U.S. at 429, 105 S.Ct. at 855.

Additionally, a trial judge's finding that a particular prospective juror was not biased is a finding of fact. *Wainwright*, 469 U.S. at 429, 105 S.Ct. at 855. This Court must review the state trial judge's findings on factual issues with a presumption of correctness. 28 U.S.C. § 2254(d); *Wainwright*, 469 U.S. at 429, 105 S.Ct. at 854.

During voir dire at Petitioner's trial, at least two prospective jurors, who were ultimately empaneled on Petitioner's jury, displayed an inclination toward the death penalty: Rufus Little and Paul Jensen. The following exchange took place between defense counsel and Mr. Little during voir dire:

> Ms. George: All right. How about you, Mr. Little? Would you automatically vote for the death penalty if there was a conviction of three people?
>
> Mr. Little: If they proved without a doubt he did it.
>
> Ms. George: You would automatically do it?
>
> Mr. Little: If they proved without a doubt, based on the circumstances, I would. But it's hard to say until I hear the whole case.
>
> Ms. George: But you did say if the person was convicted beyond a reasonable doubt, you would automatically vote for the death penalty?
>
> Mr. Little: Automatically–like I say I would automatically–like I say I would have to hear

> the case. Like I say I would automatically vote for the . . . .

Trial Transcript, at 392-93 (hereafter "T."). Mr. Little's response was interrupted by Ms. George saying, "That's all I have, your honor." *Id.* at 393. After conducting this segment of voir dire, Ms. George moved to have several jurors removed from the panel for cause, but Mr. Little was not one of them. Furthermore, the defense did not use a peremptory strike to remove Mr. Little from the panel.

The following exchange took place between defense counsel and Mr. Jensen during voir dire:

> Mr. Buice: Mr. Jensen? Where are you on that?[10] Would the fact that three people died . . .
>
> Mr. Jensen: He's convicted of three murders?
>
> Mr. Buice: Yes.
>
> Mr. Jensen: It would be very–it would determine–it would have to determine the case–the case would have to determine how I'd feel exactly, but it would be very hard for me not to vote for the death penalty because of three murders.
>
> Mr. Buice: Well, would the fact of three murders, then tend to close your mind to other considerations?

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[10] This question refers to defense counsel's previous question: "Would the fact that three people were killed in this prevent you from giving consideration to other factors in the case and giving consideration to the life sentences as appropriate punishment?" T. 110.

> Mr. Jensen: Right now it would, but it would have to be determined by the severity of the case and what was involved in determining of the three murders [sic].

T. 112-13. Defense counsel moved to strike Mr. Jensen for cause based on two things. First, Mr. Jensen was a college student at the time, and he stated that if he had to spend a week in trial, he was afraid that he could fail a class. T. 122. Defense counsel argued that "because [Mr. Jensen] feels uncomfortable about being here and he is afraid as he stated that he would fail, that would cause a burden on him to take the time that would be necessary to make a fair and impartial judgment in this case." *Id.* Second, defense counsel argued that Mr. Jensen was "equivocal as to the death penalty [and] whether or not he would [give] a life sentence if drugs or alcohol were involved." *Id.* at 126. The prosecution responded that "the fact that counsel argued that [Mr. Jensen's] answers were equivocal fails to disqualify him." *Id.* at 127. The trial court then denied the defense's motion to strike Mr. Jensen for cause, and the defense did not peremptorily strike him. *Id.*

On direct appeal, Petitioner argued that the trial court erred by failing to excuse these two jurors for cause under *Witherspoon*. The Georgia Supreme Court found that the trial court's failure to excuse these jurors was "within the deference due the trial judge's determination." *Hightower*, 386 S.E.2d at 512 (citations omitted).

In his state court habeas petition, Petitioner's argument was slightly different than his argument on direct appeal. He argued to the state habeas court that the trial court utilized the wrong standard when it failed to strike these prospective jurors for cause. Petitioner asserted that the trial court utilized the "automatic" standard from *Witherspoon*, which was discarded in favor of the "substantial impairment standard" in

Wainwright. The state habeas court did not address this argument, however.

Petitioner makes the same argument in the instant habeas petition as he made in his state habeas petition. Respondent argues that this claim is procedurally barred, because Petitioner did not raise this specific argument at trial or on direct appeal. Although the state habeas court did not address this argument, it would have found the argument to be procedurally defaulted since Petitioner had not raised it previously either at trial or on direct appeal. *See* O.C.G.A. § 9-14-51. As such, this Court cannot consider the claim unless it finds that Petitioner has demonstrated "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Schulp*, 513 U.S. at 314-15; *Murray*, 477 U.S. 478; *Sykes*, 433 U.S. at 87-88.

Petitioner has not demonstrated cause for failing to raise this argument at trial or on direct appeal. His only allegation in this regard is that his counsel was unaware at trial and on appeal that a new standard for striking death-prone jurors had been set forth in *Wainwright*.

In *Murray v. Carrier*, the Supreme Court considered the extent to which a counsel's failure to raise a claim constitutes cause for procedural default where such failure results from ignorance of the correct legal standard rather than a deliberate, tactical decision. 477 U.S. at 486, 106 S.Ct. at 2644. The Court held that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Id*. Here, Petitioner's procedural default stems from his counsel's ignorance of the correct legal standard. Under *Murray*, the

reason for this failure to raise the claim at trial and on appeal does not constitute cause excusing the default. *Id.*

Even if Petitioner were able to demonstrate cause for his default, he is unable to show prejudice resulting therefrom. Petitioner has not shown that the trial court's failure to strike Mr. Jensen and Mr. Little for cause violated his constitutional rights. Mr. Little at first responded that he would impose the death penalty if the defendant were convicted of three murders, but he later clarified that "it's hard to say" whether he would automatically impose the death penalty under the circumstances presented until he heard the whole case. T. 392-93. His later response indicates an ability to be impartial. Ms. George interrupted him before he could elaborate on his view, but, based on the response he gave, Petitioner has not shown that Mr. Little's views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424.

Mr. Jensen stated that his consideration of the sentence would "have to be determined by the severity of the case. . . ." T. 112-13. Mr. Jensen's response does not demonstrate that his views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424.

Therefore, Petitioner has not shown cause and prejudice excusing his procedural default. Furthermore, Petitioner has failed to demonstrate a fundamental miscarriage of justice. Accordingly, Petitioner is not entitled to relief on this ground.

C. Claim III: The prosecution used peremptory challenges in a racially discriminatory manner

Petitioner contends that the prosecution intentionally excluded African Americans from the jury in his trial in violation of his Sixth, Eighth, and Fourteenth Amendment rights. A prosecutor's racially discriminatory use of a peremptory challenge constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). To establish a prima facie case of a *Batson* violation, a defendant must show that (1) he is a member of a cognizable racial group, (2) the prosecutor removed a member of that racial group, and (3) the totality of the circumstances raises an inference that the prosecutor used the challenge to exclude the juror because of race. *Id.* at 97. Once the defendant makes such a prima facie showing, the burden shifts to the state to come forward with a race-neutral explanation for the peremptory challenge. *Id.*

During Petitioner's trial, the defense objected that the prosecutor was intentionally excluding African Americans from the jury. The defense pointed to the fact that the prosecutor had used only seven peremptory strikes and that six of those were used against African Americans. The defense also argued that Mr. Briley, the prosecutor, had been shown in the past to have purposefully excluded African Americans from juries. Mr. Briley responded that he had a total of ten peremptory strikes but he used only seven of them, six against African Americans and one against a white prospective juror, and that in the selection of alternate jurors he struck one white and one black veniremember.

The trial court asked Mr. Briley to explain his reasons for striking each of the jurors against whom he exercised his peremptory challenges. With respect to the African

Americans whom Mr. Briley struck, Mr. Briley explained that he struck Ricky Thomas because Mr. Thomas's father was convicted of murdering his mother and thus he might identify Petitioner's case with his father's case. T. 619. The prosecutor stated that he struck Lucious Boswell because he had prosecuted Mr. Boswell's brother-in-law for cocaine trafficking and because Mr. Boswell had stated that someone who killed three people should not get the death penalty but should work it out in prison. T. 620. The prosecutor stated that he struck Mattie Pearl Harris because she had expressed uncertainly about her stance on the death penalty and because her daughter had been convicted of a drug offense. T. 621. The prosecutor explained that he struck Norman Jonathan Mack because Mr. Mack had contradicted himself on the death penalty by first saying that he was conscientiously opposed to it and then he said he was in favor of it and then he said he was conscientiously opposed to it under some circumstances. T. 621-22. The prosecutor said that he struck Thelma Butler because she was the sister of the wife of someone whom the prosecutor had previously prosecuted. T. 623. The prosecutor stated that he struck Emerson Davis, Jr. because Mr. Davis was somewhat opposed to the death penalty. T. 624. Finally, the prosecutor explained that he struck Lynette Davis because he had just convicted Ms. Davis's uncle of burglary and because she stated that she was against the death penalty but felt that she could impose it under certain circumstances. T. 625.

After hearing Mr. Briley's explanations, the trial court held that the defense had failed to establish a prima facie case of discrimination on the part of the prosecutor and that the prosecutor had articulated a non race-related reason for striking each African American juror. T. 626. Thus, the trial court overruled the defense's *Batson* objection. *Id.*

On direct appeal, the Supreme Court of Georgia held that the trial court's determination that the prosecution had

articulated legitimate, non-racial reasons for his peremptory challenges was not clearly erroneous. *Hightower v. State*, 386 S.E.2d at 512. The court noted that the prosecutor's reasons for striking these jurors was **[sic]** because four of them were closely related to persons convicted of serious felonies, and the other two stated conscientious opposition to the death penalty. *Id.* The court further noted that at least two African-American prospective jurors were struck by the defendant after having been accepted by the prosecutor. *Id.*

The state habeas court found that Petitioner's Fourteenth Amendment claim was precluded from review because it was decided adversely to Petitioner on direct appeal and that his Sixth and Eighth Amendment claims were procedurally defaulted because those claims were not timely raised at trial and pursued on appeal.

Petitioner has raised the same constitutional claims in the instant petition as he raised in his state habeas petition. With respect to his Sixth and Eighth Amendment claims, this Court finds that they are procedurally defaulted. Petitioner has failed to show cause and prejudice excusing such default or a fundamental miscarriage of justice.

With respect to Petitioner's Fourteenth Amendment claim, because this claim has been adjudicated on the merits in state court, the aforementioned AEDPA standard controls this Court's review of the claim. 28 U.S.C. § 2254(d). Under that standard, Petitioner must show that the Georgia Supreme Court's denial of Petitioner's *Batson* claim was contrary to or involved an unreasonable application of clearly established Supreme Court caselaw. *Id.* § 2254(d)(1).

Petitioner has easily satisfied the first two prongs of his prima facie burden under *Batson*; the only disputed issue is whether the totality of the circumstances raised an inference that the prosecutor peremptorily struck certain

jurors because of their race. The trial court, having the best opportunity to view the prosecutor's demeanor and determine his credibility, found the prosecutor's explanations to be credible. The trial court also found there to be a race-neutral basis for all of the prosecutor's peremptory challenges of black prospective jurors. The Georgia Supreme Court affirmed the trial court's evaluation. This Court cannot say that the Georgia Supreme Court's determination was unreasonable or contrary to *Batson* or any other Supreme Court case within the meaning of the AEDPA. Accordingly, Petitioner is not entitled to relief on this basis.

D. Claim IV: Prosecutorial Misconduct

Petitioner contends that Mr. Briley engaged in repeated instances of prosecutorial misconduct, which deprived Petitioner of a fair trial in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Petitioner's first claim in this regard is that the prosecutor improperly induced the trial court to remove key language from a jury charge instructing that if the defendant were found to be guilty but mentally ill, he would not be released. Specifically, O.C.G.A. § 17-7-131(b)(3)(B) provides that,

> [i]n all cases in which the defense of insanity is interposed, the trial judge shall charge the jury, in addition to other appropriate charges, the following: . . . (B) I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant.

O.C.G.A. § 17-7-131(b)(3).

In the case at bar, after the close of evidence, the trial judge conducted a conference, during which he and the attorneys discussed the jury charges. The prosecution and defense agreed that a charge regarding guilty but mentally ill should be given; however, Mr. Briley objected to the wording of the statutory language, because he asserted that it did not contemplate the death penalty. He argued that the statutory wording implied that the defendant would be turned over to the state for imprisonment and that this would not be accurate in the death penalty context. T. 986-88. Mr. Briley suggested that the judge change the wording to state that if found guilty but mentally ill the defendant would be treated "according to law." *Id.* The judge responded that the best thing to do would be to say nothing at all about the disposition of the defendant. T. 988. Mr. Briley agreed to this approach, and defense counsel did not object. *Id.* So, the charge that the court ultimately gave to the jury did not contain the language from the statute regarding the defendant being given over to the Department of Corrections or Department of Human Resources. Additionally, Mr. Briley stated the following in his closing argument:

> Now, ladies and gentlemen, if we're going to say that a fellow who snorts a little cocaine and a fellow who drinks a little bit of beer and a man who's allowed himself to become so selfish that he can't stand for anybody to thwart his wishes, if we're going to find that his crime was a result of mental illness, we're turning him loose on us. That's all there is to it.

T. 1031.

Petitioner argues that the aforementioned statement in the prosecutor's closing argument coupled with the trial court's omission of the subject statutory language impermissibly gave the jury the impression that Petitioner

would have been released if the jury rendered a verdict of guilty but mentally ill.

The Georgia Supreme Court has recognized that the purpose of O.C.G.A. § 17-7-131(b)(3)(B) is to notify the jury that the defendant will not merely be released if found to be guilty but mentally ill. *Spraggins v. State*, 258 Ga. 32, 34, 364 S.E.2d 861, 863 (1988). In *Spraggins*, the trial court omitted this statutory language in its jury charge concerning the defense of guilty but mentally ill. *Id.* Additionally, during closing arguments of the guilt/innocence phase of trial, the prosecutor made the following statement:

> Folks, he's either guilty or he's not. You need to excuse him or you don't. If you want to excuse him, that's your decision. . . . So, . . . if you think he's guilty, but you don't want to punish him, or if you want to say to [the victim], "We don't care what happened to you, and we don't care what you went through," you just find him guilty but mentally retarded, then tell all the other mentally [sic] people "Don't worry about it . . . you can do anything. . . ."

Id. 258 Ga. at 34, 364 S.E.2d at 863. On appeal, the Supreme Court of Georgia reversed the defendant's conviction, because, in light of the prosecutor's strong implication in his closing argument that a verdict of guilty but mentally ill would result in the defendant's release, the court could not say that "the jury's decision to find the defendant guilty instead of guilty but mentally ill was not contributed to by the court's omission to charge on the consequences of the latter verdict." *Id.*

In the case at bar, the state habeas court found that this claim had been procedurally defaulted; thus, in order

for this Court to consider the merits of the claim, Petitioner must show cause and prejudice to excuse the default or a fundamental miscarriage of justice.

The Court assumes for present purposes that the trial court's failure to give the subject statutory jury instruction was erroneous. *See Frady*, 456 U.S. 152, 102 S.Ct. 1584 (in determining whether petitioner had established actual prejudice from counsel's failure to object to instruction given by trial court, the Supreme Court proceeded on the assumption that the instruction was in error). Nevertheless, the Court finds that Petitioner has not established *actual* prejudice resulting from his trial counsel's failure to object to the trial court's refusal to give the subject statutory charge. At most, Petitioner has shown that this alleged error created a *possibility* of prejudice; however, a mere possibility of prejudice is not sufficient. *Id.* 456 U.S. at 170, 102 S.Ct. at 1596. The evidence supporting Petitioner's guilty verdict is overwhelming, whereas there is little evidence supporting a verdict of guilty but mentally ill.[11] Petitioner has not shown that but for this alleged error, he might not have been found guilty of murder. *Reed*, 468 U.S. at 12.

Since Petitioner has not demonstrated prejudice, the Court need not reach the issue of cause. *See Francois v. Wainwright*, 741 F.2d 1275, 1283 (11th Cir. 1984) ("We need not examine the cause requirement here, because we are satisfied that Francois suffered no actual prejudice arising from the waiver of the claim.").

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[11] During the state habeas hearing, Ms. George admitted that she and Mr. Buice did not pursue a guilty but mentally ill defense before the charge conference, because they "just didn't feel like [they] could prove that . . . after looking at the evaluation of the psychiatrist." *Transcript of State Habeas Hearing*, at 169.

Additionally, Petitioner is unable to show a fundamental miscarriage of justice in this regard, because he cannot show that the alleged error has probably resulted in the conviction of someone who is actually innocent. *Schulp*, 513 U.S. at 314-15. As stated above, the evidence against Petitioner is overwhelming. In fact, there is no real question that Petitioner committed the subject killings. *See e.g.*, *Transcript of State Habeas Hearing*, Volume I, at 127-28; 177-78.

Because Petitioner has failed to establish cause and prejudice excusing his default or a fundamental miscarriage of justice, the Court is precluded from reaching the merits of Petitioner's claim regarding prosecutorial misconduct. Accordingly, Petitioner is not entitled to habeas relief with respect to this claim.

Petitioner also asserts that the prosecutor engaged in the following other instances of improper conduct: (a) arguing improperly against funds for a competent psychiatrist; (b) arguing for the inclusion of unconstitutionally death-prone jurors; (c) exercising peremptory strikes in a racially discriminatory manner; (d) improperly injecting his personal opinions throughout the trial; (e) relying upon improper objections, comments, and questions to interject his personal opinion of certain witness' veracity; (f) improperly making a racially charged remark to inflame the jury; (g) repeatedly making improper insinuations and suggestions to mislead the jury; (h) resorting to unsupported allegations against Petitioner during cross examination; (i) engaging in improper and prejudicial speeches to the jury; (j) repeatedly misrepresenting the law with respect to such issues as the standard for excluding jurors because of their views of capital punishment and the standard for a sentence of death, mitigating circumstances, and parole; and finally, (i) improperly using victim-impact evidence.

The state habeas court found that any claims of prosecutorial misconduct based on the prosecutor's arguments and alleged prejudicial statements at both phases of Petitioner's trial were procedurally defaulted. *State Habeas Order*, at 66. The state habeas court found that the defense counsel made a tactical decision not to object to the prosecutor's statements. *Id.* at 66. Thus, Petitioner failed to show cause for the default. *Id.* Furthermore, the state habeas court did not find any actual prejudice, because the remarks were not so egregious as to deny Petitioner a fair trial. *Id.* at 66-67.

After reviewing Petitioner's claims and arguments in support thereof, although the Court finds that the prosecutor, as we **[sic]** was wont to do, engaged in unprofessional conduct throughout the trial, Petitioner has not made the requisite showing of cause and prejudice to excuse his procedural default or a fundamental miscarriage of justice."[12] Accordingly, Petitioner is not entitled to habeas relief on these grounds.

E. Claim V: The trial court failed to transcribe all of the proceedings against Petitioner

Petitioner argues that several critical conferences between counsel and the trial court were never transcribed, including (1) the bench conference held during the sentencing deliberations relating to a note sent by the jury asking whether life sentences would run consecutively or concurrently, (2) the hearing regarding the defense's motion for funds to conduct voir dire held on February 19, 1988, (3)

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[12] To the extent that any of the claims presented in the instant habeas petition were not included in the state habeas petition, those claims have not been exhausted. Accordingly, this Court shall treat them as procedurally defaulted, because the Georgia courts would treat them as such under O.C.G.A. § 9-14-51.

the statement by the trial judge to defense counsel to the effect that he would not pay the defense counsel for any new motions they filed, and (4) the statement by the trial judge at the start of the suppression hearing that the defense had the burden of proof. Petitioner maintains that the failure to transcribe these events violated Petitioner's Fifth and Fourteenth Amendment Rights.

In Petitioner's state habeas corpus petition, he alleged that his trial counsel were ineffective for failing to assure that all proceedings were transcribed.[13] To the extent that Petitioner's instant claims are separate from the aforementioned claim raised in his state habeas petition, these claims have not been exhausted. Accordingly, this Court shall treat them as procedurally defaulted, because the Georgia courts would treat them as such under O.C.G.A. § 9-14-51.

After reviewing Petitioner's claims and arguments in support thereof, the Court finds that Petitioner has not made the requisite showing of cause and prejudice excusing the default or fundamental miscarriage of justice. Petitioner has demonstrated the importance of capturing the entire proceedings on record, but he has not shown that his Fifth or Fourteenth Amendment rights were violated by the fact that some of the conferences held in his case were not transcribed. As such, Petitioner is not entitled to habeas relief on this ground.

F. Claim VI: The state obtained Petitioner's confession unconstitutionally and improperly used it against him at trial

Petitioner asserts that the state obtained his confession unconstitutionally and improperly used it against

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[13] The state habeas court did not address this claim, however.

him at trial in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Petitioner makes three specific allegations in this regard. First, he contends that the state failed to honor his right to remain silent despite his repeated assertions that he had "nothing to say." Petitioner raised this claim in his state habeas petition. The state habeas court noted that, while he had alleged on direct appeal that the trial court erred in denying his motion to suppress because he requested counsel during the interrogation, "at no time did Petitioner claim that he had allegedly exercised his right to remain silent and that his request was not honored." *State Habeas Order*, at 6. As such, the state habeas court found that Petitioner's claim was procedurally defaulted and that he failed to establish cause and prejudice to excuse the default. *Id.* at 7.

Second, Petitioner maintains that the state deliberately elicited a statement from him at a critical stage in the proceeding. Petitioner raised this claim in his state habeas petition. The state habeas court noted that, while Petitioner had argued on direct appeal that his Fifth Amendment rights were violated when his request for counsel was not honored during interrogation, "Petitioner did not make any assertion on appeal that the interrogation became a 'critical stage' for purposes of the Sixth Amendment right to counsel attaching." *Id.* at 15. As such, the state habeas court found Petitioner's claim to be procedurally defaulted and that Petitioner failed to establish cause and prejudice to excuse the default.

Finally, Petitioner asserts that the state unlawfully discouraged him from exercising his right to counsel. This claim was also found to be procedurally defaulted by the state habeas court. *Id.* at 6-7.

This Court is barred from considering these procedurally defaulted claims absent a showing of cause for

the default and resulting prejudice or a fundamental miscarriage of justice. After reviewing Petitioner's claims and arguments in support thereof, the Court finds that Petitioner has not made the requisite showing of cause and prejudice or fundamental miscarriage of justice. Petitioner was repeatedly advised of his right to remain silent and his right to an attorney during questioning. The record contains no evidence that Petitioner was coerced into confessing to the subject killings. The trial court found that Petitioner's confession was voluntary, and the Georgia Supreme Court affirmed that finding on direct appeal. Accordingly, Petitioner is not entitled to habeas relief on these grounds.

G. Claim VII: The penalty phase instructions of the trial court were misleading and incomplete

Petitioner asserts that the jury's instructions during the penalty phase were misleading and incomplete in violation of his Eighth and Fourteenth Amendment rights for two reasons. First, the trial court failed to instruct the jury that it could consider Petitioner's history of alcoholism and drug use as a mitigating factor. Second, Mr. Briley asserted that voluntary alcohol use could never be a mitigating circumstance. T. 1417.

Petitioner raised this claim in his state habeas petition. The state habeas court found that Petitioner's claim was procedurally defaulted due to his failure to timely raise it at trial and on direct appeal and that Petitioner could not establish cause and prejudice to excuse the default.

After reviewing Petitioner's claims and arguments in support thereof, the Court finds that Petitioner has not made the requisite showing of cause and prejudice to excuse the default or a fundamental miscarriage of justice. The jury was not precluded from considering Petitioner's history of alcoholism and drug use as a mitigating factor. As such,

Petitioner is not entitled to have his habeas petition granted on these grounds.

H. Claim VIII: The trial court impermissibly allowed the prosecutor to introduce inflammatory victim impact evidence

Petitioner argues that the trial court impermissibly allowed the prosecutor to introduce inflammatory victim-impact evidence that so infected the trial as to render it fundamentally unfair under the due process clause of the Fourteenth Amendment. This evidence consisted of a matted 8 x 10 photograph of the victims taken four years before they were killed and an argument by the prosecutor during the sentencing phase that made references to the impact of the victims' deaths.

Petitioner raised in his state habeas petition the claim that Mr. Briley impermissibly referred to the impact of the victims' deaths on their families. The state habeas court found this claim to be procedurally defaulted. It also found that Petitioner had not demonstrated cause for and prejudice from the default, because the prosecutor was permitted to argue about the loss of the victims. *State Habeas Order*, at 69.

This Court finds that Petitioner has failed to make the requisite showing of cause and prejudice to excuse the default or a fundamental miscarriage of justice. Arguments regarding prosecutorial misconduct do not warrant habeas corpus relief unless the subject prosecutorial conduct was improper and was so prejudicial as to render the entire proceeding "fundamentally unfair." *Davis v. Kemp*, 829 F.2d 1522, 1526 (11th Cir. 1987).

The Court finds no impropriety in the prosecutor's remarks concerning the impact on the victims' families. *See*

Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991) (holding that such evidence is constitutionally admissible). Even if the prosecutor's remarks were found to be improper, they did not render the entire proceeding fundamentally unfair. Accordingly, Petitioner is not entitled to habeas relief on this ground.

Petitioner did not raise the claim regarding the photograph on direct appeal, so it has not been exhausted. Accordingly, this Court shall treat it as procedurally defaulted, because the Georgia courts would treat it as such under O.C.G.A. § 9-14-51. The Court finds that Petitioner has failed to make the requisite showing of cause and prejudice excusing the default or a fundamental miscarriage of justice. The presentation to the jury of the photograph of the victims was not so prejudicial as to render the proceeding fundamentally unfair. Accordingly, Petitioner is not entitled to habeas relief on this ground.

I. Claim IX: Petitioner was deprived of the effective assistance of counsel

Petitioner asserts that he was deprived of his right to counsel under the Sixth and Fourteenth Amendments when he received ineffective assistance at trial, at sentencing, and on direct appeal. To obtain relief on this claim, Petitioner bears the burden of demonstrating that (1) his "counsel's representation fell below an objective standard of reasonableness," and that (2) "a reasonable probability exists that but for counsel's unprofessional conduct, the result of the proceeding would have been different." *Huynh v. Washington*, 95 F.3d 1052, 1056 (11th Cir. 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "Reasonable probability" is a probability "sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694. This Court must review the reasonableness of counsel's

performance from counsel's perspective at the time, with every effort "to eliminate the distorting effects of hindsight." *Id.*

1. Ignorance of the law

a. Failure to Raise Issues

Petitioner argues that his trial counsel were ineffective for failing to raise numerous key issues at trial and on appeal. First, he claims that his counsel failed to properly object to and argue the state's introduction of improper and prejudicial aggravating evidence at the sentencing phase. Petitioner raised this claim in his state habeas petition, but the state habeas court found that this claim lacked merit. *State Habeas Order,* at 49.

This Court finds that counsel's failure to object to this evidence was not so unreasonable as to be ineffective under *Strickland*. As discussed previously (see section H, *supra*), Petitioner has failed to show that the introduction of such evidence was improper. Thus, Petitioner has not demonstrated a reasonable probability that the result of the proceeding would have been different absent counsel's alleged errors. As such, this claim is without merit.

Second, Petitioner argues that his counsel were ineffective for failing to object to the trial court's refusal to give a portion of the jury instruction regarding the "guilty but mentally ill" doctrine. As discussed previously (see section D, *supra*), Petitioner is unable to demonstrate prejudice resulting from counsel's failure to object to the trial court's refusal to give the statutory jury charge. Therefore, Petitioner cannot show a reasonable probability that but for counsel's conduct the result of the proceedings would have been different. As such, Petitioner has not

demonstrated ineffectiveness under *Strickland* with respect to this claim.

Third, Petitioner asserts that his counsel were ineffective for not demanding that the trial court charge the jury that they were not to consider the possibility of parole even though the issue was discussed during voir dire and the jury submitted the following question during their sentencing deliberations: "Would life sentences on each count run consecutively or concurrently?" T. 1468. Petitioner raised this claim in his state habeas petition. The state habeas court found that Petitioner had failed to show prejudice resulting from counsel's failure, because under the circumstances the trial court was not required to give a jury instruction about the possibility of parole. *State Habeas Order*, at 40.

This Court finds that Petitioner has failed to show that his counsel's actions were unreasonable or a reasonable probability that but for those actions the result of the proceedings would have been different. Under Georgia law, a jury may not consider a defendant's parole eligibility in the sentencing phase of death penalty case. *Quick v. State*, 256 Ga. 780, 787, 353 S.E.2d 497, 503 (1987). A trial court is required to instruct the jury that the issue of parole is not proper for their consideration *only if* the jury asks to be instructed about the possibility of parole. *Id.* Here, the jury did not ask to be instructed about parole; rather, their question concerned whether Petitioner's sentence for each count would run consecutively or concurrently. In light of the nature of their inquiry, the trial court was not required under *Quick* to specifically instruct the jury not to consider parole. As such, counsel's failure to demand such an instruction is not tantamount to ineffectiveness under *Strickland.*

Fourth, Petitioner claims that counsel were ineffective for not demanding that the trial court charge the jury not to

consider whether life sentences would run consecutively or concurrently after they submitted the aforementioned question during their sentencing deliberations. Petitioner raised this claim in his state habeas petition. The state habeas court found that Petitioner had failed to show prejudice resulting from counsel's failure, because the trial court told the jury that the issue of whether life sentences on each count would run consecutively or concurrently was "a matter within the court's discretion and not something that [it] could answer at this time,"[14] and this response was permissible under state law. *State Habeas Order*, at 42.

This Court finds that Petitioner has not shown that his counsel's conduct was unreasonable or any prejudice as a result of that conduct. *Lee v. State*, 258 Ga. 762, 763, 374 S.E.2d 199, 201 (1988) (trial court did not err in instructing the jury not to consider whether defendant would be given consecutive or concurrent life sentences) (citing *Quick v. State*). The trial court's statement to the jury was sufficient to notify them that they were not to consider the issue. Therefore, Petitioner cannot show that the result might have been different had counsel demanded an instruction in this regard. Accordingly, Petitioner has failed to demonstrate ineffective assistance of counsel.

b. Failure to Secure Proper Burden of Proof

Petitioner contends that counsel were ineffective in failing to demand that the burden of proof be placed on the state with respect to the voluntariness of his statement to police. Consequently, counsel questioned the police officers on direct examination, while the prosecutor was permitted to ask the officers leading questions on cross examination.

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[14] T. 1468-69.

Petitioner raised this claim in his state habeas petition. The state habeas court found that this contention lacked a factual basis, because the trial court did not place the burden of proof on Petitioner as he had claimed. *State Habeas Order*, at 42. Thus, the state habeas court held that Petitioner had failed to show attorney error or prejudice in this regard. *Id.* at 47.

This Court likewise finds that Petitioner has failed to demonstrate ineffective assistance of counsel with respect to this claim. Petitioner cannot demonstrate a reasonable probability that the outcome would have been different had his counsel objected to having to question the police officers on direct examination and had the prosecutor been allowed to ask them leading questions. Accordingly, Petitioner has not demonstrated ineffectiveness with respect to this claim.

c. Failure to Secure Proper Standard for Juror Excusal

Petitioner maintains that counsel were ineffective in failing to apply the correct standard regarding excusal of death-prone jurors. Petitioner did not raise this claim in his state habeas petition, and the claim therefore has not been exhausted. As such, this Court shall treat it as procedurally defaulted, because the Georgia courts would treat it as such under O.C.G.A. § 9-14-51.

The Court finds that Petitioner has not made the requisite showing of cause and prejudice to excuse the default or a fundamental miscarriage of justice. As discussed previously (see section B, *supra*), counsel's ignorance of the proper standard does not constitute ineffectiveness. *Murray*, 477 U.S. at 486, 106 S.Ct. at 2644. Furthermore, Petitioner cannot demonstrate a reasonable probability that the result of the proceeding would have been different had defense

counsel been aware of and applied the correct standard. Accordingly, this claim is without merit.

2. Failure to-investigate, develop mitigating evidence, and seek correct mitigating instructions at sentencing

Petitioner argues that counsel were ineffective in failing to investigate, failing to develop mitigating evidence, and failing to seek correct mitigating instructions at sentencing. Petitioner makes several specific contentions in this regard. First, Petitioner contends that counsel failed to visit the Georgia Bureau of Investigation or inspect their files prior to trial. Petitioner alleges that he informed his counsel that after viewing the crime scene pictures for the first time at trial, he believed that the crime scene had been altered by the state before the photographs were taken. Because counsel had not seen the pictures before then, they were not able to conduct an effective cross examination on this point. Petitioner raised this claim in his state habeas petition. The state habeas court found that no attorney error or prejudice had been shown, because Petitioner had not presented any evidence of the alteration of the crime scene. *State Habeas Order*, at 50. So, too, here, Petitioner fails to demonstrate that but for counsel's alleged error, the result of the proceeding would have been different. Accordingly, he has not demonstrated ineffectiveness under *Strickland.*

Second, Petitioner asserts that counsel never tested Petitioner's clothing for cocaine residue to corroborate his claim that he had used cocaine before the shootings. Petitioner raised this claim in his state habeas petition; the state habeas court found that no attorney error or prejudice had been shown, because Petitioner had been allowed to otherwise present extensive evidence regarding his alleged cocaine use. *Id.* This Court finds that Petitioner has failed to

demonstrate that his counsel's failure to test the clothing was unreasonable or that but for this failure the result of the proceedings would have been different. Therefore, this claim is without merit.

Third, Petitioner argues that counsel failed to request a charge regarding the effect of alcohol and cocaine consumption on his ability to knowingly, voluntarily, and willingly give a statement, waive his right to counsel, and waive his right to remain silent. Petitioner raised this claim in his state habeas petition, but the state habeas court found that no attorney error or prejudice had been shown, because Petitioner had not shown any authority requiring such an instruction. *Id.* Moreover, the trial court had determined that Petitioner's assertion that he was under the influence of intoxicants when he gave his statement to police was not credible. *Id.* This Court finds that this ineffectiveness claim is without merit.

Fourth, Petitioner contends that counsel failed to develop any legal theory supporting their introduction of evidence of Petitioner's alcohol and cocaine use, and they failed to request an instruction as to the effect of such use in support of any reasonable legal theory, such as lack of specific intent. Petitioner raised this claim in his state habeas petition, but the state habeas court found that no attorney error or prejudice had been shown, because under Georgia law, such an instruction would have been incorrect. *Id.* at 52. Furthermore, the trial court allowed counsel to argue that the effect of such use was a mitigating circumstance. *State Habeas Order*, at 52. The Court finds that counsel's conduct was not unreasonable and that Petitioner has failed to demonstrate a reasonable probability that but for counsel's actions the result of the proceedings would have been different.

Fifth, Petitioner argues that counsel repeatedly failed to object to the prosecutor's exploitation of Petitioner's alcohol and drug use as an aggravating factor. Petitioner

raised this claim in his state habeas petition, but the state habeas court found that no attorney error or prejudice had been shown, because the prosecutor was free to argue all inferences from such evidence since voluntary intoxication is not a defense under Georgia law. *Id.* at 52. This Court finds this claim to be without merit.

3. Failure to choose and support any theory of defense

Petitioner maintains that his counsel were ineffective for failing to choose and support any theory of defense. Petitioner raised this claim in his state habeas petition, but the state habeas court found that this contention lacked merit. *State Habeas Order*, at 57.

In light of defense counsel's testimony at the state habeas hearing regarding their defense tactics, this Court finds that counsel's decision regarding their theory of defense was strategic and reasonable under the circumstances. *Strickland*, 466 U.S. at 681 ("strategic decisions must be respected . . . if they are based on professional judgment."); *Spaziano v. Singletary*, 36 F.3d 1028 (11th Cir. 1994) ("The Supreme Court has mandated a highly deferential review of counsel's conduct, especially where strategy is involved. Intensive scrutiny and second-guessing of attorney performance are not permitted." (citations omitted)). Petitioner has failed to demonstrate ineffectiveness in this regard.

4. Failure to have key proceedings recorded and transcribed

Petitioner argues that counsel were ineffective for failing to have key proceedings recorded and transcribed. If counsel had ensured that a complete transcript of all proceedings was produced, Petitioner argues that certain determinitive issues could have been identified and raised on

appeal. Petitioner did not raise this claim in his state habeas petition, and the claim therefore has not been exhausted. As such, this Court shall treat it as procedurally defaulted, because the Georgia courts would treat it as such under O.C.G.A. § 9-14-1.

This Court is barred from considering procedurally defaulted claims absent a showing of cause for the default and resulting prejudice or a fundamental miscarriage of justice. Petitioner has failed to make the required showing of cause and actual prejudice with regard to these claims, and the Court does not find that failure to review this claim would result in a fundamental miscarriage of justice. Accordingly, this claim cannot form the basis of federal habeas relief.

5. Failure to have a key mitigation witness

Petitioner argues that counsel were ineffective for failing to prepare Reverend Horace Ray, a key mitigation witness. Petitioner raised this claim in his state habeas petition; the state habeas court found that no attorney error or prejudice had been shown, because such a finding would be based on the benefit of hindsight, which is not a part of the *Strickland* standard. *State Habeas Order*, at 58. This Court finds that Petitioner has not demonstrated a reasonable probability that but for counsel's failure to adequately prepare this witness, the result of the proceeding would have been different. As such, Petitioner has failed to show ineffective assistance of counsel.

6. Distancing themselves from their client

Petitioner claims that counsel were ineffective for distancing themselves from petitioner in two respects. First, they emphasized the seriousness of the offense and they told

the jury that Petitioner was responsible for the killings.[15] Second, counsel informed the jury that they were appointed to represent Petitioner. Petitioner raised both of these claims in his state habeas petition.

With respect to counsel's seemingly prejudicial comments, counsel testified at the state habeas hearing that their strategy at trial was to save Petitioner's life. *Habeas Transcript* (hereafter "H.T."), at 177; 182. Once the trial court found that Petitioner's confession was admissible, counsel knew that acquittal was "pretty much out of the question." *Id.* So, their goal was to obtain a life sentence for Petitioner rather than the death penalty. *Id.* They wanted to introduce as much as they could about family violence in the guilt/innocence phase of trial, and at sentencing they wanted to show that bad things kept happening to Petitioner and that he lacked what it took to walk away from his situation rather than getting a divorce. H.T. 127, 131-32. Neither attorney

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15 Petitioner points to the following statements made by defense counsel. During voir dire, Mr. Buice stated, "The issue is not whether Mr. Hightower killed his wife and two stepdaughters, nor is the issue whether he should be punished for that." T. 100. During his opening statement of the guilt/innocence phase of trial, Mr. Buice stated "this is not a case where certain facts are in doubt. There is no question that the crime which was committed here is a serious and grave crime. There is no question that punishment must be meted to the person who did the crime and that punishment will need to be severe." T. 672. He then conceded that petitioner shot and killed his wife and stepdaughters, and he described the event. T. 672-74. During the sentencing phase, counsel stated that "The judge could not direct that initial verdict which you brought back yesterday. Even though under the facts, of the case there was substantially no other verdict to give." T. 1438. Counsel also stated the following: "And, nothing that I can say, nothing that I intend to say intends in any way to justify [Petitioner's] behavior, which has no justification, never, from the beginning." T. 1443. Counsel stated, "I'm constantly, through this whole trial, thinking why am I not arguing a divorce case instead of a capital punishment case, what happened in this whole family that these people just didn't go and get a divorce, like, they all-like they'd done before." T. 1424.

consciously distanced himself or herself from Petitioner. H.T. 132; 180. Viewing counsel's comments during trial in the context of their trial strategy, the state habeas court found that Petitioner had not shown any attorney error or prejudice. State *Habeas Order*, at 25.

With respect to Petitioner's argument about his counsel informing the jury that they were appointed, Ms. George testified at the state habeas hearing that she and Mr. Buice decided as a tactical matter to inform the jury that they had been appointed to represent Petitioner. H.T. 159-60. Considering counsel's statement in context, the state habeas court found that counsel did not convey to the jury that they were reluctantly representing Petitioner or that they were required to do so. Rather, they were explaining to the jury that they were Petitioner's advocates. *State Habeas Order*, at 26. Thus, the state habeas court found that no attorney error or prejudice had been shown. *Id.*

Based on the aforementioned explanations of counsel at the state habeas hearing, the Court finds that Petitioner has failed to demonstrate that his counsel's conduct fell below an objective standard of reasonableness or a reasonable probability that but for counsel's conduct, the result of the proceeding would have been different. *Strickland*, *466* U.S. at 689. It is clear that counsel's conduct was based on tactical decisions that were reasonable under the circumstances. *Strickland*, 466 U.S. at 681. Accordingly, Petitioner is not entitled to relief on these grounds.

7. Failure to object to prosecutorial misconduct

Petitioner next asserts that counsel were ineffective in failing to object to many of the prosecutor's instances of misconduct (see section D, *supra*). In his state habeas petition, Petitioner argued that counsel were ineffective in allowing the

prosecutor to argue that if Petitioner were found to be mentally ill, he would be "turn[ed] loose." The state habeas court found that Petitioner had isolated a portion of the prosecutor's argument in his assertion of impropriety, and that viewing it in context revealed that the prosecutor was really arguing that voluntary intoxication was not a valid defense.[16] *State Habeas Order*, at 57. In other words, if the jury were to accept Petitioner's defense and acquit him, Petitioner would have been set free. The state habeas court found that these remarks did not render Petitioner's trial fundamentally unfair. *Id.*

This Court, too, finds that viewed in context, the prosecutor's statements did not render Petitioner's trial unfair. Moreover, Petitioner has failed to demonstrate a reasonable probability that but for defense counsel's failure to object to such statements the results of the proceedings would have been different. Accordingly, Petitioner has not demonstrated ineffectiveness under *Strickland.*

8. Failure to demand voir dire and disqualification of jurors who had disregarded the court's instructions

Before the jury was charged, the trial judge notified counsel of the following:

> One of the ladies on the jury has told me that one of the other jurors has told her that no matter what anybody said she'd already made up her mind. Did

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16 The prosecutor argued the following: "Now, ladies and gentlemen, if we're going to say that a fellow who snorts a little cocaine and a fellow who drinks a little bit of beer and a man who's allowed himself to become so selfish that he can't stand for anybody to thwart his wishes, if we're going to justify him for killing somebody. *If we're going to find that this crime was a result of mental illness, we're turning him loose on us.* That's all there is to it." T. 1031 (emphasis added).

> not say which way she'd made up her mind. I, I, you know, have no suggestion as to how we should proceed on that. I frankly don't know how we should proceed.

T. 1461.

The trial judge, defense counsel, and the prosecutor all agreed that there was nothing they could do. *Id.* at 1461-62. Defense counsel did not object or move to excuse the juror and replace her with an alternate. But, the defense did move for a mistrial immediately after the trial court gave the jury a brief supplemental instruction. The trial court denied the motion for mistrial. On direct appeal, the Supreme Court of Georgia found that there was no abuse of discretion in this regard. *Hightower,* 386 S.E.2d at 513.

In the instant petition, Petitioner argues that counsel were ineffective in failing to demand a voir dire and disqualification of the juror who violated the trial court's instructions. Petitioner raised this claim in his state habeas petition. During the state habeas hearing, Mr. Buice stated that he did not know whether the juror had made up her mind for or against Petitioner. H.T. 183-84. He thought that it would be dangerous to ex[illegible]e the issue and that more harm than good could have resulted. *Id.* at 191. In order to preserve this issue for appeal, however, counsel decided to move for a mistrial. *Id.* Viewing counsel's strategic decision without the benefit of hindsight, the state habeas court found that counsel's actions were not unreasonable. *State Habeas Order*, at 61. Thus, no attorney error or prejudice was shown.

This Court finds that counsel's testimony at the state habeas hearing demonstrates that he made a strategic decision not to challenge the juror's alleged misconduct. Under the circumstances, counsel's tactical decision was not

unreasonable. *Strickland*, 466 U.S. at 681. As such, Petitioner has not shown ineffective assistance of counsel.

9. Failure to Use Peremptory Strikes

Petitioner maintains that counsel were ineffective in failing to peremptorily strike certain jurors. First, Petitioner asserts that counsel should have struck jurors Jensen and Sapp, because both stated that evidence of Petitioner's consumption of alcohol and cocaine would adversely affect their ability to find him not guilty of murder.

Petitioner raised this argument in this state habeas petition, but the state habeas court found that no attorney error or prejudice had been shown. *State Habeas Order*, at 62. The court noted the fact that both jurors ultimately said that they would be able to consider rendering a life sentence. *Id.* at 62. And, even though Mr. Jensen said that it would be hard for him not to vote for a death sentence because of three murders, he did state that it would 'have to be determined by the severity of the case and what was involved in determining of [sic] the three murders." *Id.* (quoting T. 113). The state habeas court found that these jurors may have been more favorable to Petitioner than other individuals whom counsel chose to strike and that it would be "sheer speculation" to suppose that the result of the proceedings would have been different if these two jurors had been struck from the panel.

This Court finds that Petitioner has failed to show a reasonable probability that but for counsel's failure to peremptorily strike these jurors, the result of the proceeding would have been different. Accordingly, counsel's actions did not constitute ineffectiveness.

10. Failure to Seek Recusal of Trial Judge

Petitioner claims that counsel were ineffective in failing to seek the recusal of the trial judge on the grounds that before

the trial he stated off the record that he would not approve additional funds for the defense counsel's motions. Petitioner raised this claim in his state habeas petition, but the state habeas court found that no attorney error or prejudice had been shown because Petition had not shown that the trial judge's statement would have provided a basis for recusal. *State Habeas Order*, at 49.

So, too, here, Petitioner has failed to show grounds for the trial judge's recusal. As such, Petitioner cannot demonstrate a reasonable probability that but for counsel's actions the results of the proceedings would have been different. Accordingly, Petitioner has not demonstrated ineffectiveness under *Strickland*.

11. Failure to Object to Hearsay

Petitioner asserts that counsel was ineffective in failing to object to the prosecutor's introduction into evidence the **[sic]** prejudicial statements by the victims' family members about alleged conversations with Petitioner but accepting the prosecutor's argument that statements by Petitioner to his family were hearsay. Petitioner raised this claim in his state habeas petition. But, the state habeas court found that no attorney error or prejudice had been shown, because the statements by the victims' family members were not prejudicial on their face since they related to counsel's attempts to portray Petitioner's domestic situation as "too pressurized" for him. *State Habeas Order*, at 64. This Court finds that Petitioner has failed to demonstrate a reasonable probability that but for counsel's actions the result of the proceeding would have been different. Accordingly, Petitioner has failed to show ineffective assistance of counsel in this regard.

J. Miscellaneous Claims

In the instant petition, Petitioner has propounded three other claims for relief. First, Petitioner argues that the trial court's charge on intent during both the guilt/innocence and sentencing phases of trial improperly shifted the burden of proof of the crucial element of intent to Petitioner, in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The court charged the jury as follows:

> Intent is an essential element of any crime and must be proved by the State beyond a reasonable doubt. Intent may be shown in many ways, provided you, the jury believe that it existed from the proven facts before you. It may be inferred from the proven circumstances or by acts and conduct or it may be in your discretion inferred when it is the natural and necessary consequences of the act. Whether or not you draw such an inference is a matter solely within your discretion. . . . You may infer in this case, if you wish to do so, that the acts of a person of sound mind and discretion are the product of his will. And, you may infer, if you wish to do so, that a person of sound mind and discretion intends the natural and probable consequences of his acts.

T. 1043-44. Petitioner contends that the court's charge allowed the jury to infer that Petitioner intended the ordinary consequences of his voluntary act, in violation of the Fourteenth Amendment's requirement that the State prove every element of the offense beyond a reasonable doubt.

Petitioner raised this claim in his state habeas petition. The state habeas court found that this claim had been procedurally defaulted. *State Habeas Order*, at 74.

The court also found that Petitioner had not shown actual prejudice, because the charge given by the trial court was not burden shifting. *Id.* at 74-75.

This Court finds that Petitioner has failed to make the requisite showing of cause and prejudice excusing the default or a fundamental miscarriage of justice. Accordingly, he is not entitled to relief on this ground.

Second, Petitioner maintains that the State deprived him of his right to counsel by not ceasing interrogation upon his request for an attorney. Petitioner raised this claim in his state habeas petition. The state habeas court found that this claim had been procedurally defaulted. *State Habeas Order*, at 15. And, Petitioner had failed to show any actual prejudice, because the Petitioner's Sixth Amendment rights had not attached yet. *Id.* Furthermore, the Supreme Court of Georgia had already found that Petitioner's statement was knowingly and voluntarily entered and that there was no evidence that he had requested and was refused counsel. *Id.* at 16. *See Hightower*, 386 S.E.2d at 511. This Court finds that Petitioner has failed to demonstrate cause and prejudice excusing the default or a fundamental miscarriage of justice. As such, this claim does not warrant habeas relief.

Finally, Petitioner claims that there was an improper form of the jury verdict because it did not indicate that they **[sic]** jury found the existence of a certain aggravating factor "beyond a reasonable doubt." Petitioner has not raised this claim previously, so it has not been exhausted. Accordingly, this court must treat it as procedurally defaulted. O.C.G.A. § 9-14-51. After reviewing Petitioner's claim and arguments in support thereof, the Court finds that Petitioner has not made

the requisite showing of course and prejudice excusing the default or fundamental miscarriage of justice. Accordingly, Petitioner is not entitled to habeas relief on this claim.

CONCLUSION

After carefully reviewing Petitioner's habeas petition and briefs in support as well as the State's briefs, the record of the trial proceedings, the decision of the Supreme Court of Georgia, and the state habeas proceedings and order, the Court finds no grounds upon which to grant Petitioner relief. Accordingly, Petitioner's § 2254 petition (tab # 16) is hereby **DENIED.** Additionally, Petitioner's motion to take depositions and for order requiring the state to answer requests for discovery (tab # 31) is also hereby **DENIED.**

SO ORDERED, this [4] day of August, 1998.

/s/ Duross Fitzpatrick

DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT.

APPENDIX C

515 U.S. 1162, 115 S. Ct. 2618, 132 L.Ed.2d 860

John Washington HIGHTOWER, petitioner, v. Albert G. THOMAS, Warden

No. 94-8920

June 26, 1995.

Rehearing Denied Sept. 1, 1995.

See 515 U.S. 1183, 116 S. Ct. 30.

Petition for writ of certiorari to the Supreme Court of Georgia denied.

APPENDIX D

Supreme Court of the United States

No. 04A157

John Washington Hightower,

Applicant

v.

Derrick Schofield, Warden

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 1, 2004.

/s/ Anthony Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 23rd
day of August, 2004.

APPENDIX E

Expert Statement of Gary L. Liberson, Ph.D.

QUALIFICATIONS

I received my undergraduate degree in applied mathematics and computer sciences from Washington University in St. Louis, Missouri, in 1968. I received a masters degree in statistics in 1971 and a Ph.D. in mathematical statistics in 1981, both from the George Washington University in Washington, D.C.

From 1971 to 1975 1 was employed as a statistician with the Office of Economic Opportunity in Washington, D.C. In that position, I reviewed and analyzed statistical data to determine whether there was discrimination in hiring and employment practices.

From 1975 to 1980, I was Chief of the Program Integration Branch of the Office of Analysis and Evaluation at the Environmental Protection Agency ("EPA"). My responsibilities included developing statistical analysis for environmental regulations governing industrial discharges into waste water. At the request of the EPA administrator, I served as a hearing officer to determine the statistical validity of various methodology proposed by the oil industry and EPA for compliance with various environmental regulations.

From 1980 to 1984, I was employed in the private sector, first as a. division director for Sciences Applications, Inc., and then as Vice President of Environmental Risk Assessment Service (USA). In those positions, I was responsible for general statistical analysis of various environmental and health studies.

From 1984 to 1990, I was self-employed as a consultant. In this capacity, I analyzed statistical sampling and quality control of various environmental regulations and performed statistical analyses for several private firms.

In 1989, I was retained by counsel for then Georgia death-row inmate Jimmy Lee Horton to perform statistical analysis regarding the peremptory strikes exercised by prosecutor Joseph Briley in all criminal trials for which there were available data, including the trial of John Hightower. From my analysis, I concluded that the probability that Mr. Briley's peremptory strikes were exercised in those cases without regard to race of the juror was substantially less than one chance in 100,000. From the same data, I also concluded that the probability that Mr. Briley's peremptory challenges were exercised without regard to the race of the defendant was also substantially less than one chance in 100,000. *See* Report of Gary L. Liberson, attached hereto as Exhibit 1. Thus, I concluded there was an extremely high correlation of strikes to race in cases prosecuted by Mr. Briley. I still hold these same opinions. The Federal Court of Appeals for the Eleventh Circuit discussed my report in depth in granting Mr. Horton" request for *habeas corpus* relief. *See* Horton v. Zant, 941 F.2d 1449, 1457-59 (11th Cir. 1991), attached hereto as Exhibit 2.

From 1990 to the present I have been a Principal of Environmental Risk Sciences, Inc. ("ERS"), in Washington, D.C. I co-founded ERS in January, 1991. ERS performs statistical analyses for a diverse selection of clients in an array of fields.

UNDERTAKING

I have agreed to assist counsel for petitioner John Hightower to analyze the peremptory strikes exercised by Mr. Briley in the Hightower trial to determine the likelihood that Mr. Briley acted in a race neutral manner in that case.

DATA

I base my analysis on the data incorporated in the table and chart entitled: "John Hightower Jury Selection - Race," attached hereto as Exhibit 3, as well as the list of potential jurors, attached hereto as Exhibit 4. These data show, in summary:

Mr. Hightower's jury included nine white jurors and three black jurors. Mr. Briley exercised six of seven peremptory challenges to strike black potential jurors.[1]

If both Mr. Briley and the defense had used the full allotment of peremptory strikes, a total of 42 potential jurors would have been considered for a position on the jury (10 prosecution strikes + 20 defense strikes + 12 seated jurors = 42 potential jurors).

Twenty-four of these 42 potential jurors were white; 14 were black.[2]

ANALYSIS

I performed two separate analyses of the relevant data in the Hightower case. Together, they demonstrated that the

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1 *See*, Exhibit 3; Tr. Transcript at 600-09, attached hereto as Exhibit 5.

2 Potential jurors 2, 3, 14, 23, 24, 27, 28, 29, 32, 33, 34, 37, 38 and 39 were black.

probability that Mr. Briley exercised his peremptory challenges in a race neutral manner is negligible, somewhere between 1 in 308 (0.32% probability) and 1 in 8,855 (0.01% probability).

1. It is Extremely Unlikely that Mr. Briley Would Exercise Six of Seven Peremptory Strikes Against Blacks in a Pool Containing Twice as Many Whites Than Blacks Unless His Strikes Were Race-Related

My first inquiry considered the probability that Mr. Briley would exercise at least six out of seven peremptory strikes against blacks in a pool of 42 potential jurors (28 whites and 14 blacks). If Mr. Briley had exercised his peremptory strikes without regard to the race of the prospective juror, the likelihood he would use at least six of seven strikes against blacks is only 1 in 308. If we look only at the 35 potential jurors who were actually considered (24 whites and 11 blacks), the likelihood that at least six of seven strikes would be used against blacks falls to 1 in 589. Quite simply and obviously, the fact that Mr. Briley used six of seven peremptories against blacks in a group that contained twice as many whites as blacks is highly consistent with the hypothesis that his strikes were based on race, and it is extremely unlikely that his strikes had nothing to do with race.

Thus, my analysis of the race of prospective jurors struck by Mr. Briley from the Hightower jury is entirely consistent with my analysis of his peremptory strikes in all capital cases throughout his career, including both the *Horton* case and this one. *See* Exhibit 1. The race of the prospective juror explains Mr. Briley's strikes extraordinarily well, from a statistician's perspective.

2. Mr. Briley Minimized the Number of Blacks on the Jury

I next analyzed the probabilities that the Hightower jury would be racially mixed regardless of whether Mr. Briley exercised his peremptory challenges in a racially biased manner. This analysis required a comparison between two scenarios. *See* Exhibit 3.

Scenario 1 was based on the hypothesis that there was no racial bias in the selection of jurors. I began by measuring the probability that at the beginning of the final selection process, absent bias, the jury would contain one or more blacks. Given the actual racial composition of the pool of 42 potential jurors, the probability of a racially mixed jury was 99.7% at the beginning of jury selection, assuming race-neutral strikes. The remainder of Scenario 1 indicates the likelihood after each prospective juror was struck or seated that the resulting jury would have one or more additional black jurors (no matter how many blacks had already been seated) assuming race-neutral challenges.

Scenario 2 analyzed the probability that the jury would be racially mixed *even if Mr. Briley had used all of his peremptory challenges against blacks.* This scenario indicates the probability before jury selection started, and then after each successive prospective juror was struck or seated, that the resulting jury would include at least one additional black juror (no matter how many blacks had already been seated), *even if Mr. Briley did everything in his power to keep blacks off the jury.*

The results are displayed both in table form and as a graph in Exhibit 3. The table shows that at the beginning of the selection process there was a 99.7% chance that at least one black juror would be seated on the jury *if* all

peremptory strikes were race-neutral (Scenario 1). Scenario 2 shows that even if Mr. Briley did everything in his power to strike blacks from the jury, there would still be an 86.5% probability that one or more blacks would sit on the jury. *In other words, it was clear from the beginning of the peremptory strike process that even if Mr. Briley exercised every one of his peremptory challenges against blacks, he nevertheless had less than one chance in seven of seating an all-white jury.*

For the first twenty-three potential jurors, Mr. Briley *did* do everything in his power to exclude blacks from the jury. He struck all four black potential jurors he faced and passed on all nineteen white potential jurors he faced. At the end of that series six white jurors -- half the panel -- had been seated. *See* Ex. 3.

I evaluated the probability that Mr. Briley's use of peremptory strikes while selecting; the first half of the jury was race neutral. Given the fact: that Mr. Briley used four peremptory strikes against the first twenty-three jurors, the probability that those four strikes were exercised in a race-neutral manner against the only four blacks in that group is one in 8,855.[3] Thus, the statistical evidence that Mr. Briley's first four strikes were racially motivated is overwhelming.

Despite Mr. Briley's decision to strike all the blacks and pass on all the whites during consideration of the first 23 potential jurors, the likelihood that he would be able to seat an all-white jury had actually dropped substantially by the time he reached potential juror #24. At that point, the probability of a racially mixed jury had

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[3] This figure is arrived at as follows: 4/23 x 3/22 x 2/21 x 1/20 = 1/8855.

risen from 86.5% (at the beginning of jury selection) to 95.1%, *even if Mr. Briley continued using all his strikes against blacks.*[4] Thus, when Mr. Briley decided not to strike black potential juror #24, it was statistically almost certain that there would be one or more blacks on the jury *no matter what Mr. Briley did.*

As the table shows, even *after* potential juror #24 was seated on the jury (pre-juror #25), Mr. Briley still faced an 84.1% likelihood that one or more *additional* black jurors would be seated, *even if Mr. Briley used all of his remaining peremptory strikes against blacks.* By the time Mr. Briley reached black potential juror #27, this likelihood had increased to a new high of 95.5%, not far from the 99.5% likelihood that at least one additional black juror would be seated on the jury even if Mr. Briley used his peremptory strikes in a race-neutral manner (Scenario 1). Thus, when Mr. Briley allowed black potential juror #27 to be seated on the jury, it was virtually certain, from a statistical perspective, that two or more blacks would be seated on the jury *no matter how Mr. Briley used his remaining strikes.*

Even after Mr. Briley let black juror #27 onto the jury, he still faced an 83.3% probability that he would not be able to avoid seating a *third* black juror (Scenario 2).[5] Thus, when he allowed black potential juror #28 to be seated on the jury, Mr. Briley gave in to the overwhelming probability that

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4 If Mr. Briley acted in a race-neutral manner from that point on, the chances of seating at least one black juror would be 99.7% (Scenario 1).

5 If Mr. Briley acted in a race-neutral manner from this point onward, there would still be a 97.4% probability that a third black juror would be seated on the jury (Scenario 1).

a third black juror would be seated *no matter what Mr. Briley did.*

CONCLUSION

Based on the foregoing statistical analyses, including my earlier work relied on by the Eleventh Circuit in the *Horton* decision, I conclude that it is extremely unlikely -- far less than a 1% probability, from a statistical perspective -- that Mr. Briley's peremptory strikes were exercised in a race-neutral manner in the Hightower case. Mr. Briley's strikes appear, from a statistical perspective, to be very closely related to the prospective juror's race, and I know of no other variable that could explain them. In my professional opinion, there is a probability well in excess of 99% that Mr. Briley's six strikes of black prospective jurors in the Hightower case were made on the basis of race. Put simply, Mr. Briley's actions in exercising his peremptory strikes were consistent with the behavior of someone whose goal was to minimize the number of blacks on the jury.

/s/Gary L. Liberson

Gary L. Liberson, Ph.D.

November 22, 1996